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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 191⁵

No. [REDACTED] 42

J. F. BAILEY, TRUSTEE IN BANKRUPTCY IN THE MAT-
TER OF GRANT BROTHERS, BANKRUPTS, APPEL-
LANT,

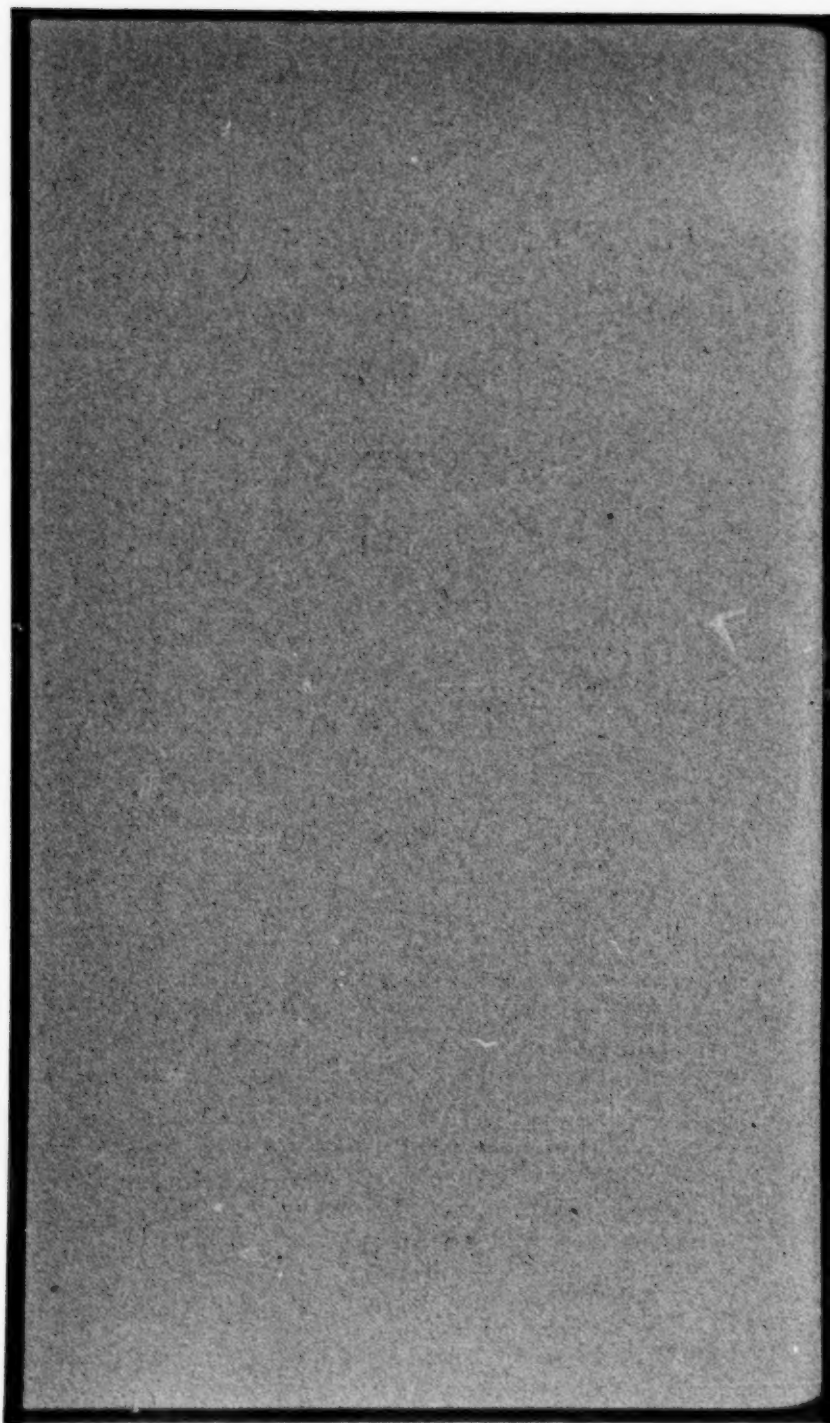
vs.

BAKER ICE MACHINE COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

FILED DECEMBER 31, 1913.

(23,993)



(23,993)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 321.

J. F. BAILEY, TRUSTEE IN BANKRUPTCY IN THE MATTER OF GRANT BROTHERS, BANKRUPTS, APPELLANT,

vs.

BAKER ICE MACHINE COMPANY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

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a Pleas and Proceedings in the United States Circuit Court of Appeals for the Eighth Circuit, at the September Term, 1913, of said Court, Before the Honorable William C. Hook and the Honorable John E. Carland, Circuit Judges, and the Honorable Arba S. Van Valkenburgh, District Judge.

Attest:

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court of
Appeals for the Eighth Circuit.*

Be it remembered that heretofore, to-wit: on the twenty-first day of June, A. D. 1913, a transcript of record pursuant to an appeal allowed by the District Court of the United States for the District of Kansas, was filed in the office of the Clerk of the United States Circuit Court of Appeals for the Eighth Circuit in a certain cause wherein the Baker Ice Machine Company is Appellant and J. F. Bailey, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupts, is Appellee, which said transcript as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, is in the words and figures following, to-wit:

1 (Citation.)

The United States of America to J. F. Bailey, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupts, Greeting:

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals for the Eighth Circuit, at the City of St. Louis, Missouri, sixty days from and after the day this Citation bears date, pursuant to an Appeal, filed in the Clerk's office of the District Court of the United States for the First Division of the Judicial District of Kansas, wherein Baker Ice Machine Company is Appellant and you are Appellee, to show cause, if any there be, why the decree rendered against the said Appellant, as in said Appeal mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, The Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, this 2nd day of June, A. D. 1913.

JOHN C. POLLOCK,
*United States District Judge
for the District of Kansas.*

U. S. Marshal's Return.

Received this Citation at Topeka, Kansas, June 2, 1913, and served the same upon W. S. McClintock, attorney of record of J. F. Bailey, Trustee in bankruptcy in the matter of Grant Brothers, bankrupts, personally, by delivering a true and certified copy of this writ with all endorsements thereon at Topeka, Kansas, on the 3d day of June, 1913, at 9 o'clock a. m.

JOHN R. HARRISON,

U. S. Marshal,

By B. F. KLENNIKEN, *Dep.*

Fees \$2.00

Filed in the District Court on June 3, 1913.

(Voluntary Petition in Bankruptcy.)

In the District Court of the United States for the District of Kansas,
First Division.

In Bankruptcy. No. 1525.

In re GRANT BROTHERS, Bankrupt-

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Partnership Petition.

To the Honorable John C. Pollock, Judge of the District Court of the United States for the District of Kansas, First Division::

The petition of Grant Brothers respectively represents:

That your petitioners have been partners under the firm name of Grant Brothers, having their principal place of business at Horton, Kansas, in the County of Brown and District and State of Kansas for the greater portion of the six months next immediately preceding the filing of this petition; that said partners owe debts that they can not pay in full; that your petitioners are willing to surrender all their property for the benefit of their creditors, except such as is exempt by law, and desire to obtain the benefit of the acts of Congress relating to bankruptcy.

That the schedule hereto annexed marked A, and verified by [petitioner's] oath contains a full and true statement of all the debts of said partners, and as far as possible, the names and places of residence of their creditors, and such further statements concerning said debts as are required by the provisions of said acts.

That the schedule hereto annexed, marked B, and verified by the oath of your petitioners, contains an accurate inventory of all the property, real and personal, of said partners, and such further statements concerning said property as are required by the provisions of said act.

Your petitioners further represent that there is no personal or

real property owned by them outside of the partnership property listed in schedule B except the property listed as exempt property.

Wherefore, your petitioners pray that the said firm may be adjudged by a decree of the court to be bankrupts within the purview of said acts.

ROY GRANT.
CARL GRANT.
BEATRICE GRANT.

A. B. CROCKETT, *Attorney.*

UNITED STATES OF AMERICA,
District of Kansas, First Division, Brown County, ss:

Roy Grant, Carl Grant, and Beatrice Grant being three of the petitioners above named do hereby make solemn oath that the statements contained in the foregoing petition, and subscribed by them, are true.

ROY GRANT.
CARL GRANT.
BEATRICE GRANT.

On this 10th day of July, 1912, before me personally appeared Roy Grant, Carl Grant and Beatrice Grant, the persons mentioned in the petition herein and did declare the said petition to be a true statement of all the matters therein contained.

[SEAL.]

JOHN P. KILKENNY,
Notary Public.

Comm. expires September 5, 1915.

Filed in the District Court on July 11, 1912 at 8:30 A. M.

Order of Adjudication by Referee in Judge's Absence.

Now on this 12th day of July, 1912, there is received from the Clerk of the United States District Court at Topeka, Kansas, the petition of Roy Grant, Carl Grant, Beatrice Grant, partners trading under the firm name of Grant Brothers, of the City of Horton, County of Brown, State and District of Kansas, asking to be declared a bankrupt, within the true intent and meaning, together with the order of Reference of the above matter from the Clerk of the District Court in the Absence of the Judge from the First Division of the District; and said matter now coming regularly on for hearing and being duly considered by the undersigned, it is found that the said firm of Roy Grant, Carl Grant and Beatrice Grant, partners trading under the name of Grant Brothers should be declared a bankrupt, as prayed for.

It is therefore ordered: That said firm of Roy Grant, Carl Grant and Beatrice Grant, partners trading under the firm name of Grant Brothers be and they are hereby declared and adjudged a bankrupt, accordingly.

Done at Kansas City, Kansas, in said District, this 12th day of July, 1912.

E. R. ADAMS,
Referee in Bankruptcy.

Filed in the District court on July 13, 1912.

Petition of the Baker Ice Machine Company Claiming Certain Property as Interveners.

Comes now the Baker Ice Machine Company of Omaha, Nebraska and respectfully shows to the Court:

4 1. That the said The Baker Ice Machine Company is a corporation duly organized and existing under and pursuant to the laws of the State of Nebraska and having its principal place of business in the City of Omaha, in the State of Nebraska, and that its corporate name is The Baker Ice Machine Company.

2. That on the 14th day of October, A. D. 1911, in the City of Omaha and State of Nebraska, the said Baker Ice Machine Company entered into an agreement with one Roy Grant of Horton, Kansas, whereby the said company sold and agreed to construct and deliver to the said Roy Grant within thirty five days from said date, F. O. B. cars at Omaha, Nebraska, a certain ice making and refrigerating apparatus for the sum of Five thousand nine hundred and forty (\$5940) Dollars, payable as follows: \$2500 upon delivery of said apparatus, \$500 payable February 1st 1912; \$600 April 20th, 1912; \$600 May 20th, 1912, \$600 June 20th, 1912; \$600 July 20th, 1912; \$540 August 20th, 1912; the said deferred payments to be evidenced by promissory notes for the several amounts bearing six per cent interest from their date.

The said company further alleges that it was further expressly understood and agreed and so specified in said contract between said parties that the legal title to and the legal possession of the machinery, apparatus and appurtenances of the said ice making and refrigerating apparatus should be and remain — the said Baker Ice Machine Company until the said Roy Grant should have fully and completely paid for the same and until all the notes or other evidences of indebtedness representing the contract price of said machinery, apparatus and appurtenances should have been fully paid. And it is further agreed that the said machinery, apparatus and appurtenances should not under any circumstances be regarded as fixtures to any realty upon which the same should be placed until full and final payment therefor had been made.

3. It was further agreed in said contract that in case of failure or refusal on the part of the said Roy Grant to make the said payments or any of them when due under this contract or to pay any note that should be given under this contract when the same should become due, that then the whole of the unpaid purchase money arising under said contract should thereupon at the option of the said company become immediately due and payable, and that the said Company should have the right to enter upon the premises upon

which said machinery and apparatus should be installed and take exclusive possession of the same, and carry the same away without being liable in any way therefor to the said Roy Grant.

5 The said icemaking and refrigerating apparatus are more particularly described in certain specifications made on the said 14th day of October, 1911, and attached to the said contract hereinbefore mentioned and which contract was duly executed by the said Baker Ice Machine Company and by the said Roy Grant, at Omaha, Nebraska, on the said 14th day of October A. D. 1911, and a copy of the said contract with a copy of the said specifications relating to the said ice making and refrigerating apparatus attached to the said contract are here attached to this petition and marked "Exhibit A" and made a part thereof the same as if fully set out herein.

That under date of February 1st, 1912, the said Roy Grant made, executed and delivered to the said Company his certain promissory notes as provided for in the said contract as hereinbefore set out. Copies of the said several notes are hereto attached as a part hereof and marked ["Exhibit B" and B. 1, 2, 3, 4 and 5, respectively.

4. That the said ice making and refrigerating apparatus and plant was duly delivered to the said Roy Grant, F. O. B. cars at Omaha, Neb., as provided for in said contract and was installed in accordance with the terms thereof and by the said Grant duly accepted under date of February 3, 1912.

5. That the said Roy Grant paid the said sum of \$2,500 which he agreed to pay upon the delivery of the said ice making and refrigerating apparatus and also under date of February 1st, 1912, paid the further sum of \$700.14 and which sum was credited as follows: \$350.07 on the note of \$540 due August 20th, 1912, and \$350.07 on the note of \$600 due July 20th, 1912; and that there remains due and unpaid from the said Roy Grant to the said Baker Ice Machine Company as a part of the purchase price of the said ice making and refrigerating apparatus, the sum evidenced by the said several notes amounting to a total of \$2,738.86 with interest thereon at six per cent from the 1st day of February, 1912.

6. That the said contract and agreement was so made and executed, and the said ice making and refrigerating apparatus so delivered to the said Roy Grant by the said Company in Douglas County, in the State of Nebraska, and that under the laws of the State of Nebraska, no registering or recording of the said contract and agreement was required in order to make the said agreement valid between the said parties, nor in order to acquire or maintain a preference in relation to the said property referred to in the said contract over any other creditors the said Roy Grant might have.

The said Company further alleges that on the 15th day of May, 1912, it duly filed in the office of the Register of Deeds of
6 Brown County, Kansas, a true copy of the said contract and agreement.

7. That on the third day of July, A. D. 1912, the said Roy Grant having failed to pay the balance due on the said purchase price as evidenced by the said promissory notes as hereinbefore alleged and set out, and there being then due and unpaid on said indebtedness

the said sum of \$2,738.86 with interest at six per cent from the first day of February, 1912, the said Baker Ice Machine Company exercised its right as reserved to it under said contract, and agreement, and entered upon the premises where the said property was located at Horton, Kansas, and took full and complete possession of the same and held and maintained possession thereof until the 23rd day of July, A. D. 1912, when the same, under a stipulation made on that date with the approval of this court was surrendered to the Receiver appointed by the court in the proceedings relating to the bankruptcy of Grant Brothers, and of which firm the said Roy Grant is alleged to have been a member.

The said Company alleges that it is specified in the said stipulation that the said surrender of possession should not constitute a waiver of any right or claim made by the said Company or the said Receiver, and that the said Company files this petition herein in order that its rights and interest in the said property may be speedily determined.

Wherefore, said Baker Ice Machine Company prays that the court may find and determine that it is the owner of the said ice making and refrigerating apparatus hereinbefore referred to and described, and that it may adjudge and order that the possession thereof be delivered to the said Company immediately and for such other orders as may be just and proper in its behalf to be made.

THE BAKER ICE MACHINE COMPANY,
By MEANS & ARCHER, BROME, ELLECK &
BROME, *Attorneys.*

STATE OF NEBRASKA,

Douglas County, ss:

J. L. Baker, being first duly sworn, says: that he is the President of the Baker Ice Machine Company and in the active management of the business of said concern, and has personal knowledge and acquaintance of the transactions between the said Baker Ice Machine Company and one Roy Grant of Horton, Kansas, and has read and knows the allegations made in the foregoing petition, and
7 says that the allegations and averments made therein are true, to the best of his knowledge and belief. So help him God.

J. L. BAKER.

Subscribed and sworn to before me this 22d day of August, A. D. 1912.

[SEAL.]

F. H. DRAKE,
Notary Public.

My Commission expires 4-1-1916.

EXHIBIT "A."

Baker Ice Machine Company,

Manufacturers of

Refrigerating and Ice-Making Machinery.

Main Office and Works, Omaha, Nebraska, U. S. A.

Telephone Douglas 1361.

Proposal and Specifications.

OMAHA, Oct. 14, 1911.

To Roy Grant, Horton, Kan.:

We hereby propose to furnish you an ice making and refrigerating Plant in accordance with the following specifications:

Compression Side.

The compression side of said Plant shall consist of: Purchaser will supply necessary Power, shafting and belting erected in place.

Gas Compressor—There shall be Two (2) single acting Cylinders of $6\frac{3}{4}$ inches diameter and 12 inches stroke, made of semi steel of a character that will wear hard and smooth; to be tested at shop to a hydrostatic pressure of 500 lbs. to the square inch, and guaranteed to be absolutely gas tight. All valves and valve seats to be of tool steel.

Main Shaft—To be best hammered forged open hearth steel. Shaft to be turned perfectly true and finished. Diameter in bearing to be $4\frac{5}{8}$ inches.

Fly-Wheel—To be made of cast iron, 4 feet in diameter, weighing about 2,500 pounds, and turned to run true.

Condensers—We will construct and supply 1 [sections] double pipe condensers, which shall be 20' 6" in length over all and 8 12 pipes high. Pipes to be one and one-quarter and two inches in diameter.

Ammonia Connections—There shall be supplied by us one ammonia receiver, oil separator, scale trap, [guages], and [guage] boards; also the necessary fittings, pipes and stop-valves, which may be required to connect the compressor condensers, ammonia receiver and other parts of the apparatus, which constitute the compression side of our plant.

Painting—We will cover all the pipes, valves, fittings and condensers with a coat of water-proof paint before shipment, and will paint the machine in an artistic manner.

Wrenches and Tools—We will supply the wrenches and tools necessary to take the machine apart for examination, and for the adjustment of the different parts.

Foundations of Machinery—You to construct and provide at your own cost and expense all suitable and proper foundations, upon which Engine, Compressor and other machinery is to be placed. You to be responsible for building same. We to supply plans. Foundation to be ready — days from date of contract. You are also to do all necessary grouting after the machinery is set.

Steam, Exhaust, Water Pipes and Sewer Connections—We to provide the necessary water pipes and valves and to place them in proper position to distribute water over the condensers. You to provide the necessary sewer connections and to bring the water supply where required.

Ammonia—All the anhydrous ammonia necessary for the prime charge of the plant to be supplied by us about 300 #.

Light—You to provide a good and sufficient light to enable us to put up work in dark places.

Carpenter, Mason Work, Etc.—You to furnish the material for and do all carpenter or mason work that may be required, such as cutting holes in walls, ceilings, floors or partitions and repairing the same, or any other carpenter or mason work that may be required in the erection of the plant, and you to dig the necessary trenches required and to permit the use of elevators when not otherwise employed.

Items Not Mentioned in Specification.

(2) Centrifugal Pumps for following service:

1 Pump for circulating Brine from Ice Tank through the Brine Cooler and back to Tank.

9 1 Pump for circulating Brine from Ice Tank through Coils in storage Rooms.

BAKER ICE MACHINE CO. AND

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Expansion Side—Ice Making Plant.

The Expansion Side of the Plant shall consist of:

One complete System and Apparatus for the manufacture of practically clear marketable ice at the rate of 5 tons per day of 24 hours.

Ice Can—90 Ice Cans made of No. 16 galvanized iron, well riveted or lap-seamed and soldered to be absolutely watertight. To be strengthened at the top by a wrought iron galvanized band, and to produce ice blocks of 300 lbs. Cans to be furnished by us.

Freezing Tank—Freezing Tank, made of $\frac{1}{4}$ " steel, well riveted, braced and strengthened with angle iron, to be perfectly tight. The tank to be of such size as to [accommodate] the 88 ice cans, and the length and width to be adapted to the room in which the same is to be erected. Tank to be furnished by us. Length — width — depth —.

Wood Covers and Frame Work—A complete Frame-Work of Wood, made to fit the top of the tank and a set of wooden covers for same, one for each can, so as to permit the removal of one can at a

time without exposing any more tank surface than is necessary; to be furnished by us.

Insulation of Tank—The sides of tank to be provided with good insulation; all to be furnished by lumber and carpenter work to be furnished by you, we to supply lith and granulated [cord] for same.

Foundation for Tank—A suitable foundation for the freezing tank to be furnished by you.

Insulation for Bottom of Tank—You to provide good insulation between the foundation and the bottom of the freezing tank. We to provide the lith and cork.

Brine Cooling Coils—There shall be sufficient quantity of Brine Cooling Coils, with all necessary connections, to be furnished by us.

Ammonia Connections—All the Ammonia Pipe Connections, Fittings and Valves required to connect the brine cooling coils with the supply and return mains to be furnished by us.

10 **Traveling Crane and Hoist**—There shall be a Traveling Crane and a Hoist, made of iron or wood, or both, including iron rails, provided for the purpose of lifting the ice cans out of the tank and moving them to the thawing apparatus and back into the tank. To be furnished by us.

Thawing Apparatus—Automatic Steel Can Dump or Standard Flat Dump for thawing the ice out of the ice cans, to be furnished by us.

Condensing and Filtering [Ap-aratus]—One complete condensing and Filtering Apparatus consisting of: Steam Condenser, Charcoal Filter or Deodorizer, Condensed Water Cooler and a Water Storage Tank with necessary coils. All the necessary pipes for conveying exhaust steam from heater to condenser and distilled water from steam condenser to ice cans, with cocks, valves, rubber hose and can filler. The apparatus shall have capacity to deliver not less than 5 tons of pure distilled and filtered water ever- 24 hours, provided the boiler feed water is suitable for ice making purposes and has been approved by us.

The whole construction of the apparatus shall be of such character that it will at all times, when kept in good working order, condense and filter the necessary quantity of steam for the manufacture of 5 tons of ice. The whole apparatus furnished by us.

All steam, exhaust and water pipes, with valves and fittings except those specified above to be furnished by you.

Platforms and Supports—You to supply suitable platforms and supports on which to set the thawing apparatus and the different vessels of condensing and filtering apparatus.

Insulation of Rooms—Proper insulation of rooms to be supplied by you and approved by us. We to supply the necessary cork and lith to do the work.

Insulation of Pipes—Proper insulation of pipes where they are exposed to the action of warm air, to be supplied by you and approved by us.

Chloride of Calcium or Salt—All the Chl. of Calcium necessary to make the brine for the first or prime charge of the freezing tank to be furnished by us.

Buildings—You to provide suitable buildings, in which the Plant may be erected and operated.

11 Items Not Mentioned in Specification.

Necessary lith and granulated cork for tank and rooms as specified, also the necessary lith.

BAKER ICE MACHINE CO. AND

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Expansion Side.

Packing Houses, Breweries and Cold Storage Houses.

Brine System.

The Expansion side of the Plant shall consist of

Brine-Cooling Coils—Vertical Double Pipe Brine-Cooling coils, which shall be 18' 6" in length, and necessary pipes high. Pipes to be 3x2 inches in diameter. To be furnished by us.

All the pipes and fittings necessary to connect the Brine Coolers to the supply and return-mains, to be furnished by us.

Brine Pump and Connections—Brine Pump to be of ample size and capacity, to circulate all the brine necessary for properly supplying the brine circulating coils used in connection with the plant and all the suction-pipes from brine tank to pump, to be furnished by [—].

Power—For operating Pump to be furnished by you.

Brine-Circulating Pipes—All the 1¼ inch pipes necessary to reduce to the temperatures as herein specified the following Rooms, Chambers or Cellars to be furnished by [—].

Insulation—All necessary insulation required for exposed piping and rooms to be supplied by you and approved by us.

BAKER ICE MACHINE CO. AND

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12 Expansion side—Cold Storage Houses—Brine System—2.

Nos.	Character of rooms.	Length.	Width.	Height.	Cubic feet.	Temperatures.
1	Ante Room about	22	10	8		
2	Ice Storage Rooms	32	23	8		
3	Ante Rooms to meat	Bx. 14	4	8		
4	Meat Room Boxes	14	12	8		
5	General Storage	26	16	8		
Total:						Cubic Feet.

The temperatures in the before mentioned rooms are to be brought to and maintained at the degrees —, as above specified, upon condition that they are or will be properly insulated.

Chloride of Calcium or Salt—All the Chl. of Calcium necessary to make the brine for the brine tank and the brine circulating coils, to be furnished by us.

BAKER ICE MACHINE CO. AND

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Freight, Erection, Guarantees and Special Items.

Freight and Cartage—All the items as furnished by us under this specification to be delivered f. o. b. cars at Omaha, Neb. The freight and cartage to and at the place of erection to be paid by you and deducted from the different payments in equal amounts.

Erection, Erecting Tools and Rigging—We will furnish one skilled erector to superintend the erection of the plant, and the use of all the erecting tools and rigging necessary at \$6.00 per day and expenses from the time he leaves Omaha until he returns.

All the labor required for assisting in the erection of the plant to be furnished by you.

13 Buildings—You to provide suitable building and available space in which the plant may be erected and operated.

Workshop—You to set apart within your premises where the said apparatus is to be erected, a suitable place for our workshop, and which we may use free of charge as a storehouse for tools and material during the time the plant is being erected.

Power, Water, Oil and Waste—You to provide the necessary power, water, oil and waste for operating the machinery, or for use during the erection and testing of the machine or plant.

Authority to Use—We will authorize and permit you to operate the said machine when placed within your premises, and to make use of our system as applied to the apparatus, together with all the several parts incidental thereto which are secured to us by Letters Patent, free from any royalty over and above purchase money hereinafter specified to be paid us during and after completion of said apparatus.

Immunity from Cost by Infringement—We will furthermore hold you harmless from all damage sustained by reason of any infringement upon the patents of others.

Plans and Drawings—We will furnish all the plans and drawings necessary for the erection of the plant herein specified, and will supply preliminary sketches for the building, giving principal dimensions if required.

Verbal Understanding—There is no verbal or written understanding outside of this specification and annexed agreement as written and printed.

Guarantees—We will construct the said ice making and refrigerating plant in all of its parts in a thorough and workmanlike manner and under the stipulated conditions, will guarantee that the said

plant will perform the work herein specified. If at any time within one year succeeding the date of the charging of the plant it becomes necessary to replace any part of the engine, compressor, piping or tanks, by reason of any latent defect in workmanship or material, we will deliver, free of charge, on board cars, Omaha, Neb., a new part to replace the defective one, the usual wear and tear caused by your negligence or carelessness or that of your workmen excepted.

Gauranteed Capacity of Machine—Equal in Refrigeration to the melting of 15 tons of ice in 24 hours or equal to the manufacture of 5 tons of ice in 24 hours and the cooling of storage rooms as specified.

14 The above capacity of the machine is guaranteed under the condition that the plant is properly and regularly operated, and in case the machine is used for ice making, that the ice is drawn at regular intervals throughout the day and night.

BAKER ICE MACHINE CO.,
Per _____
BAKER ICE MACHINE CO. AND
_____.

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(EXHIBIT B.)

Contract.

This Agreement, made this 14 day of October, 1911 By and between the Baker Ice Machine Co., a corporation existing under and pursuant to the laws of the State of Nebraska, having its principal place of business in the City of Omaha, State of Nebraska, party of the first part, and Roy Grant, Horton Kan., party of the second part,

Witnesseth: That the party of the first part, and the part of the second part, for and in consideration of one dollar, by each to the other paid, the receipt of which is hereby acknowledged, and for other valuable considerations which are herein specified, do hereby promise, covenant and agree each with the other, and do hereby bind themselves, their successors, legal representatives, heirs, executors, administrators, and assigns, to faithfully perform, fulfill and carry out all of the several provisions, conditions and requirements in accordance with the specification forming part of this agreement and hereunto annexed, to-wit:

That the said party of the first part hereby agrees to construct and deliver to the said part of the second part, F. O. B. Cars, Omaha, Nebraska, the ice making and refrigerating apparatus made under Letters Patent owned or controlled by the Baker Ice Machine Co., and in accordance with the annexed specifications, for the sum of Five thousand nine hundred forty dollars (\$5940.00) to be paid by the party of the second part, to the party of the first part, with exchange on Omaha as follows: 10% with order.

\$2500.00

\$500.00 Febr. 1st, 1912, \$600.00 April 20th, 1912, \$600.00 May

20th, 1912, \$600.00 June 20th, 1912 \$600.00 July 20th, 1912.
 \$540.00 Aug. 20th, 1912. Above notes to be dated and delivered
 when plant is started in operation and to draw 6% interest
 15 per annum from date.

The purchaser is to advance all money needed for freights, labor, board, local purchases and such other disbursements as would otherwise have to be made by us, deducting such advances from the last two (2) payments.

It is hereby understood that the party of the first part will furnish all the parts in accordance with the annexed specification, and have the plant ready to ship in 35 days from the date on which this contract is executed, providing the said party of the first part is in no way delayed by the party of the second part, and has free and unlimited access for men and material to each and all of the several rooms, cellars or chambers wherein the work is to be performed, at least days before the time above specified. Furthermore any delay caused by the party of the second part changing the plans agreed upon between the parties hereto shall be added to the time allowed and the cost of such changes shall be at the expense of the party of the second part.

If the party of the first part is obstructed or delayed in the prosecution or completion of the work to be done by it under the terms of this contract, by Fire, any Strike, delays in the transportation of material, or other causes beyond its control, then and in such case the party of the first part shall be entitled to such extension of the time herein specified for the completion of said work as shall be reasonable under the circumstances.

And it is further agreed, that as soon as the whole or any portion of the material for the machine and plant is delivered on the premises of the party of the second part, any loss or damage by fire or otherwise, is to be borne by the said part- of the second part.

It is also agreed that as soon as the whole or any part of the material arrives on the premises of the part- of the second part and until the party of the first part has been fully paid in cash, the part- of the second part shall keep the same insured against loss or damage by fire in such insurance companies as are approved by the party of the first part for an amount at least equal to the unpaid portion of the purchase price thereof, loss or damage under these policies to be made payable to the party of the first part as its interest may appear and the policies are to be delivered to the party of the first part. Should the party of the second part fail to insure the machinery, the party of the first part is privileged to insure it in its favor at the expense of the party of the second part and the part- of the second part agrees to pay to the party of the
 16 first part on demand the premiums paid for such insurance.

It is, however, expressly understood and agreed by and between the parties hereto that the legal title to and the legal possession of the machinery, apparatus and appurtenances herein set forth shall be and shall remain in the said party of the first part until the said part- of the second part shall have fully and completely paid for

the same, and until the notes or other evidences of indebtedness representing the contract price of said machinery, apparatus and appurtenances shall have been fully paid; and the said machinery apparatus and appurtenances shall not under any circumstances be regarded as fixtures to the realty upon which the same shall be placed until full and final payment therefor has been made; and in case of failure or refusal on the part of the part- of the second part to make payments or any of them when due under this contract, or to make settlement by the execution and delivery of notes or other obligations as herein agreed, or to pay any note that may be given the party of the first part when the same shall fall due, that then and in any such events the whole of the unpaid portion of the purchase money however secured, and whenever payable, arising under this contract, shall thereupon and at the option of the said party of the first part become immediately due and payable; and in case of such default on the part of the part- of the second part, the party of the first part shall have the right to enter upon the premises upon which such machinery, apparatus or plant is installed and to take exclusive possession of the same and carry away the same without being liable in any way therefor to the part- of the second part; and the part- of the second part shall afford the party of the first part every facility for such removal. And it is hereby further agreed that in case said machinery apparatus, or plant shall be taken by the party of the first part under this agreement by reason of default by the party of the second part as hereinbefore set forth, that then and in any such case the party of the second part shall pay the party of the first part all expenses incurred by the party of the first part under this contract, and for all damages to the party of the first part arising from the wear and tear of the said machinery, apparatus, or plant, and such further sum of money as will reasonably compensate the party of the first part for the use or rental by the party of the second part of the said machinery, apparatus, or plant, which said rental is hereby fixed and agreed to be six per cent per annum upon the total purchase price herein agreed to be paid, and to be calculated from the date when the machinery, apparatus or plant herein contracted

17 for is erected ready to charge; but the foregoing provisions shall in no wise alter or impair the obligations of the party of the second part to keep said machinery, apparatus or plant in good condition while in the custody of the party of the second part, nor in any wise release the party of the second part from the liability to pay to the party of the first part, all damage to such machinery, apparatus or plant which may be occasioned by the negligence, carelessness or abuse thereof, by the party of the second part, his representatives or employees.

And it is further agreed by the party of the second part that the party of the first part shall have the right to file a [Mechanics] Lien for materials and labor furnished under this contract and this stipulation is hereby declared to be notice to the party of the second part, owner or reputed owner of the property as given at the time of furnishing the materials and labor for said plant or for

said repairs, alterations or additions herein provided for, of the intention to file a lien and a waiver [of] — any other notice of such intention.

All of the agreements herein set forth are hereby made binding upon and [enforceable] by the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

This agreement does not become binding on the party of the first part until it has been signed and executed by one of its duly authorized officials in the city of Omaha.

In Witness Whereof, the parties hereto have duly executed these presents this.... — ..day of.... — .., 191—.

BAKER ICE MACHINE CO.,
By J. A.
ROY GRANT, *Purchaser.*

Approved at Omaha, Neb., Oct. 14, 1911.

BAKER ICE MACHINE CO.,
By JAMES ALLEN, *Secty.*

EXHIBIT "B. 1."

OMAHA, NEB., Febr. 1st, 1912. \$500.00

No. 1.

February 1st, 1912, after date we jointly and severally promise to pay to Baker Ice Machine Co. or order, Five Hundred and 00/100 Dollars, For value received, payable at The Merchants National Bank, Omaha, Nebraska, with interest at the rate of 6 per cent per annum from date until paid.

ROY GRANT.

"B. 2"

OMAHA, NEB., Febr. 1st, 1912. \$600.00

No. 2.

April 20th, 1912, after date we jointly and severally promise to pay to Baker Ice Machine Co. or order, Six Hundred and 00/100 dollars for value received, payable at The Merchants National Bank, Omaha, Nebraska, with interest at the rate of 6 per cent. per annum from date until paid.

ROY GRANT.

"B. 3"

OMAHA, NEB., Febr. 1st, 1912. \$600.00

No. 3.

May 20th, 1912, after date we jointly and severally promise to pay to Baker Ice Machine Co. or order, six hundred and 00/100

dollars for value received, payable at The Merchants National Bank, Omaha, Nebraska, with interest at the rate of 6 per cent. per annum from date until paid.

ROY GRANT.

"B. 4"

OMAHA, NEB., Febr. 1st, 1912. \$600.00

No. 4.

June 20th, 1912, after date we jointly and severally promise to pay to Baker Ice Machine Co. or order, six hundred and 00/100 dollars for value received, payable to The Merchants National Bank, Omaha, Nebraska, with interest at the rate of 6 per cent per annum from date until paid.

ROY GRANT.

"B. 5"

OMAHA, NEB., Febr. 1st, 1912. \$600.00

No. 5.

July 20th, 1912, after date we jointly and severally promise to pay to Baker Ice Machine Co. or order, six hundred and 00/100 dollars for value received, payable at The Merchants National Bank, Omaha, Nebraska, with interest at the rate of 6 per cent per annum from date until paid.

ROY GRANT.

Endorsements: Febr. 1st, 1912. Credit Roy Grant with \$350.07 on this note. B. I. M. CO., per G. K. W.

"B. 6."

OMAHA, NEB., Febr. 1st, 1912, \$540.00.

No. 6.

August 20th, 1912 after date we jointly and severally promise to pay to Baker Ice Machine Co. or order Five hundred forty and 00/100 dollars for value received, payable at The Merchants National Bank, Omaha, Nebraska, with interest at the rate of 6 per cent per annum from date until paid.

ROY GRANT.

Endorsements: 2/1/1912. Credit Roy Grant with \$350.07 on this note as per contract. B. I. M. Co., per G. K. W. Filed in the District Court on August 26, 1912.

Answer of Grant Brothers to Petition of Baker Ice Machine Company.

Comes now the Grant Brothers, bankrupts herein, and for answer to the petition of the Baker Ice Machine Company, filed herein say that the said Grant Brothers deny each and every, all and singular the allegations in said petition contained, except what is hereinafter admitted.

The said Grant Brothers admit that the said Baker Ice Machine Co. is a corporataon duly organized under the laws of the State of Nebraska and is having its place of business in the City of Omaha, Nebraska.

That the said Machine Company entered into a contract with the said Roy Grant as alleged in the second paragraph of the petition of the said Machine Company.

20 That under the terms of said contract the title was not to pass to the said Roy Grant, as alleged in said petition, but that the said Grant Brothers expressly deny that the legal or equitable possession of the said machinery and the apparatus and appurtenances of said refrigerator should remain in the said Baker Ice Machine Company, as alleged in the said petition of the said Baker Ice Machine Company, but admit that said machinery and apparatus and appurtenances should not become a part of the realty to which it was attached.

The said Grant Brothers further admit that in case of failure or refusal on the part of Roy Grant to make payments or any of them when due, under the contract, or to pay any note that should be given under the contract mentioned herein, when the same should become due, then the whole of the unpaid purchase money should become due at the option of the said Machine Company as alleged in its said petition filed herein, but the Grant Brothers say that the said Machine Co. has never exercised its option by declaring its election to have the [balance] of the said notes given by the said Roy Grant to be due, that was not due at the time the proceedings herein were had, to declare the said Grant Brothers bankrupts.

The Grant Brothers, herein admit that said Roy Grant did execute and deliver to the said Baker Ice Machine Company his certain promissory notes, as set forth in said petition filed herein, but that the said machinery was delivered, installed by the said Machine Company and excepted by the Grant Brothers herein of which said firm the said Roy Grant was a member at the time he executed and delivered the said contract and notes as mentioned herein.

Grant Brothers further admit that there has been paid the sum of \$3200.17 on the promissory notes given by the said Roy Grant to the said Machine Company as alleged in its petition. The said Grant Brothers further admit that said Machine Company did not file the contract, mentioned herein and in the petition filed by the said Machine Company, with the Register of Deeds of Brown county, Kansas until the 15th day of May, 1912, as required by the laws of the State of Kansas. The Grant Brothers expressly deny that said

Machine Company took full possession of the machinery and appurtenances, so sold and delivered, to Roy Grant, as alleged in the petition of the said Baker Ice Machine Company, and deny the said Machine Company took any possession whatever.

For further answer and cross petition of the said Grant Brothers they say that at the time Roy Grant executed and delivered the notes and contract as alleged in the petition of the said Baker Ice Machine

Company, filed herein, he did so execute and deliver the
21 same for and on behalf of the said Grant Brothers, a firm of which the said Roy Grant was at that time a member, and he, the said Roy Grant acted for and on behalf of the said firm of Grant Brothers, bankrupts herein, at all times he was dealing with the said Baker Ice Machine Co. and at the time the said Machinery and appurtenances connected with the ice plant and cold storage, which was delivered, installed and erected in Horton, Kansas, by the said Baker Ice Machine Company, it was so delivered installed and erected by said Machine Company for the said firm of Grant Brothers, bankrupts herein.

Further answering the said Grant Brothers sayeth not.

A. B. CROCKETT,
Attorney for Grant Brothers.

Filed in the District Court on September 18th, 1912.

In the District Court of the United States for the District of Kansas,
First Division.

No. 1417.

In re ROY GRANT, CARL GRANT, and BEATRICE GRANT, Trading
under Firm Name of Grant Brothers, Bankrupts.

Certificate of Referee on Review.

I, E. R. Adams, one of the Referees of this Court in Bankruptcy, do hereby certify that in the course of the proceeding in said cause before me, The Baker Ice Company, of Omaha, Nebraska, filed an intervening petition, claiming certain machinery in the possession of the Trustee in Bankruptcy by virtue of a conditional sale contract executed by and between the above bankrupts and The Baker Ice Company at Omaha, Nebraska, on the 14th day of October, 1911. To this intervening petition the Trustee filed an answer, and upon the issues thus joined a hearing was had, and subsequently a re-hearing was had, and from the testimony introduced, the Referee made Findings of Fact and Conclusions of Law, and entered an order sustaining the Trustees' objections to the intervening petition of The Baker Ice Company and disallowing said intervening petition, of which order the intervening petitioner asks this review. The question presented on this review is, did the Referee err in disallowing said intervening petition?

The evidence as to some matters was contradictory, and upon

these matters the Referee made Findings of Fact. The vital question in this review is, whether the conditional sale contract is governed by the laws of Nebraska or by the law of Kansas. If the contract is governed by the law of Nebraska, then it was not necessary

22 to file the contract in the office of the Recorder of Deeds of Brown County, Kansas, and the intervening petition should be allowed; however, if the conditional sale contract is governed by the law of Kansas, then it was necessary to its validity, as against the Trustee in Bankruptcy, under the laws of Kansas and the amendment of 1910 to Sec. 47 of the Bankruptcy Act, that the contract be filed in Brown County, Kansas.

Although the conditional sale contract was signed in Omaha, Nebraska, as is stated on page 1 of the intervenor's brief, "by its terms the machinery was to be installed and the performance of the contract terminated in the State of Kansas." The intervenor did, in fact, superintend the installation of the machinery at Horton, Kansas, and the machinery was finally accepted, in writing, by the bankrupts at Horton, Kansas, on February 3, 1912.

As a general proposition, it is undoubtedly true that when property located in another state is mortgaged in that state and is thereafter brought into the State of Kansas, the *lex contractus* will control; however, when, at the time a chattel mortgage or conditional sale is entered into in another state, it is the intention of the parties that the property be sent into this state, then the laws of this state, and not the *lex contractus*, controls. This doctrine is announced by the following authorities:

"The weight of authority holds, in accordance with the rules relating to chattel mortgages, that, unless the local law of the state into which property is moved with reference to filing or recording conditional contracts of sale expressly or by clearly implication applies to contracts made out of the state with reference to property subsequently brought into the state, it is not necessary to file or record the mortgage in that state, unless it was contemplated at the time of the sale that the property should be removed to such state, in which case filing or recording seems to be necessary, notwithstanding that the contract of sale was completed in another state."

Wharton on Conflict of Laws, Sec. 355.

"If property sold upon condition is situated at the time in the state of the forum or if it is bought with the known intention of removing it to that state, or if the contract is to be performed there, then the validity and effect of the contract are governed so far as future dealings with the property in the state of the forum are concerned, not by the *lex loci contractus*, but by the *lex fori*."

23 Hammon on Conditional Sales, p. 252.

"A written contract for sale of personal property was made in New York, reserving title in the sellers until full payment was made. The property was delivered to the buyers in New York for removal to Connecticut, and for use in that state in the buyers' factory. The contract complied with all provisions of New York

law on the subject of conditional sales, but lacked an acknowledgment, and would therefore be an absolute sale in Connecticut, except as between the parties. Later the property was taken and sold on execution against the buyers. Held, in a suit by the sellers against the execution purchasers, that the contract must be governed by Connecticut law, since, though it was made in New York and the property was delivered there, its whole beneficial operation and effect and its completion were to be in Connecticut, and the parties must be held to have contracted with reference to Connecticut law."

Beggs vs. Bartels, 46 Atl. 874.

"If a person sends his property within a jurisdiction different from that where he resides, he impliedly submits to the rules and regulations enforced in the country where he places it."

Hervey vs. Locomotive Co., 93 U. S. 664;

Denny vs. Bennett, 128 U. S. 489, 9 Sup. Ct. 134;

In re Legg, 96 Fed. 326.

In accordance with the foregoing authorities, the Referee held that the conditional sales contract in question was controlled by the laws of the State of Kansas, and that the withholding of the same from record in Kansas and the filing of the same in the office of the Register of Deeds of Brown County, Kansas, within four months prior to the filing of the petition in bankruptcy, under the circumstances shown in the Findings of Fact, constituted a Preference, and that therefore the intervening petition should be denied.

I hand up herewith, for the information of the judge, the following papers:

(1) The order of which a review is sought.

(2) The petition on which this certificate is granted.

(3) The intervening petition and the Trustee's answer thereto.

24 (4) The testimony taken at the hearings on the issues thus joined.

Kansas City, Kansas, March 10, 1913.

E. R. ADAMS,
Referee in Bankruptcy.

Order Disallowing the Intervening Petition of the Baker Ice Company.

Now on this 15th day of February, 1913, the Referee, having heard the evidence submitted on behalf of the Intervenor, The Baker Ice Company, and on behalf of the trustee in bankruptcy, and being fully advised in the premises, makes the following findings of fact, conclusions or law, and order thereon:

Findings of Fact.

(1) That on July 11th, 1912, the firm of Grant Brothers, consisting of Roy Grant, Carl Grant and Beatrice Grant, filed its volun-

tary petition in bankruptcy in this district, and was on the same day adjudged a bankrupt.

(2) That on October 14th, 1911, the firm of Grant Brothers entered into a written contract with the Baker Ice people, at Omaha, Nebraska, for the purchase of ice machinery of the total value of \$5,940.00, payable in installments, the machinery to be shipped to Horton, Kansas, and installed by the Baker Ice Company; said contract being what is commonly called a conditional sale contract.

(3) Said conditional contract was never filed of record in the State of Nebraska, and was not filed in the office of the register of deeds of Brown County, Kansas, until May 15th, 1912.

(4) That the first shipment of machinery under said contract arrived in Horton, Kansas on November 15th, 1911, with a sight draft for \$1,000.00 attached to the bill of lading, and the second shipment arrived in Horton, Kansas on November 20th, 1911, with a sight draft for \$1500.00 attached to the bill of lading.

(5) That in order to meet the drafts above mentioned, Grant Brothers, on November 15th, 1911, borrowed of the First National Bank, of Horton, Kansas, the sum of \$2500, and executed a note and mortgage to the First National Bank on all of said ice machinery to secure the payment of said note, which chattel mortgage
25 was filed in the office of the register of deeds of Brown County, Kansas on November 17th, 1911.

(6) That thereafter other shipments arrived in Horton, Kansas, and said machinery was installed under the supervision of G. K. Williams, the representative of the Baker Ice Company, and was, on February 5th, 1912, accepted in writing by Grant Brothers at Horton, Kansas.

(7) That on the 5th day of February, 1912, Roy Grant and Carl Grant told said G. K. Williams that they were unable to pay the note of \$500.00 which had become due the Baker Ice Company, on February 1st, 1912 and told said G. K. Williams that they had borrowed all the money they could borrow and that they had executed to the First National Bank, of Horton, Kansas, a chattel mortgage on said ice machinery to secure the money by them borrowed from said bank.

(8) That the second note in the sum of \$600.00 due the Baker Ice Company from Grant Brothers fell due April 20th, 1912.

(9) That between the 5th day of February, 1912, and the 15th day of May, 1912, Grant Brothers wrote the Baker Ice Company numerous letters, advising them that they were unable to pay said \$500.00 note, which had become due February 1st, 1912, and said \$600.00 note, which had become due April 20th, 1912, and further advising said Baker Ice Company that they had borrowed all the money they could borrow.

(10) That on the 15th day of May, 1912, said \$500 and said \$600 note- were past due and unpaid, and said firm of Grant Brothers was insolvent.

(11) That on the 15th day of May, 1912, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent, and that by filing the conditional sale contract in the

office of the register of deeds of Brown County, Kansas, it would effect a preference to the Baker Ice Company over the other creditors of said firm of Grant Brothers.

(12) That the firm of Grant Brothers retained possession of said ice plant machinery until the receiver in bankruptcy took possession of the same on July 13th, 1912.

Conclusions of Law.

(1) That said conditional sale contract was governed by the laws of the State of Kansas.

26 (2) That on May 15th, 1912, at the time of the filing of said conditional sale contract in the office of the register of deeds of Brown County, Kansas, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent and that the effect of the filing of said contract would be to prefer the Baker Ice Company over the other creditors of Grant Brothers.

(3) That the filing of said conditional sale contract by the Baker Ice Company in the office of the register of deeds of Brown County, Kansas, on the 15th day of May, 1912, constituted a voidable preference within the meaning of the Bankruptcy Act.

It is therefore, Ordered: that the Intervening Petition of the Baker Ice Company be and the same is hereby disallowed and denied.

Done at Kansas City, Kansas, in said District, this 15th day of February, 1913.

E. R. ADAMS,
Referee in Bankruptcy.

Filed in the District Court on March 11th, 1913.

Exceptions to Findings and Conclusions of Referee of Baker Ice Machine Company.

Now on this 15th day of February, 1913 comes the Baker Ice Machine Company, Intervener herein, and at the time the findings of fact, and conclusions of law, were made by Hon. E. R. Adams, Referee in Bankruptcy, before whom said proceedings were heard, and excepts to finding of fact Number Five, being in the words and figures following, to-wit:

"(5) That in order to meet the drafts above mentioned, Grant Brothers, on November 15th, 1911, borrowed of the First National Bank, of Horton, Kansas, the sum of \$2500, and executed a note and mortgage to the First National Bank on all of said ice machinery to secure the payment of said note, which chattel mortgage was filed in the office of the register of deeds of Brown County, Kansas, on November 17th, 1911."

And likewise excepts to finding of fact Number seven, being in the words and figures following, to-wit:

"(7) That on the 5th day of February, 1912, Roy Grant and Carl

Grant told said G. K. Williams, that they were unable to pay the note of \$500.00 which had become due the Baker Ice Company on February 1st, 1912, and told said G. K. Williams that they had borrowed all the money they could borrow and that they had executed to the First National Bank, of Horton, Kansas, a chattel mortgage on said ice machinery to secure the money by them borrowed from said bank."

And likewise excepts to finding of fact Number Nine, being in the words and figures following, to-wit:

"(9) That between the 5th day of February, 1912, and the 15th day of May, 1912, Grant Brothers wrote the Baker Ice Company numerous letters, advising them that they were unable to pay said \$500.00 note, which had become due February 1st, 1912, and said \$600.00 note, which had become due April 20th, 1912, and further advising said Baker Ice Company that they had borrowed all the money that they could borrow."

And likewise excepts to finding of fact Number Eleven, being in the words and figures following, to-wit:

"(11) That on the 15th day of May, 1912, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent, and that by filing the conditional sale contract in the office of the register of deeds of Brown County, Kansas, it would effect a preference to the Baker Ice Company over the other creditors of said firm of Grant Brothers."

And likewise excepts to finding of fact Number Twelve, being in the words and figures following, to-wit:

"(12) That the firm of Grant Brothers retained possession of said ice plant machinery until the receiver in bankruptcy took possession of the same on July 3rd, 1912."

And said Intervener, Baker Ice Machine Company, at the same time excepted to conclusion of law Number One, being in the words and figures following, to-wit:

"(1) That said conditional sale contract was governed by the laws of the State of Kansas."

And likewise except to conclusion of law Number Two, being in the words and figures following, to-wit:

"(2) That on May 15th, 1912, at the time of the filing of said conditional sale contract in the office of the register of deeds of Brown County, Kansas, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent and that the effect of the filing of said contract would be to prefer the Baker Ice Machine Company over the other creditors of Grant Brothers."

And likewise excepts to conclusion of law Number Three, being in the words and figures following, to-wit:

"(3) That the filing of said conditional sale contract by the Baker Ice Machine Company in the office of the register of deeds of Brown County, Kansas, on the 15th day of May, 1912, constituted a voidable preference within the meaning of the Bankruptcy Act."

And likewise at the same time said Baker Ice Machine Company

excepted to the order of said Referee, disallowing and denying the intervening petition of said Baker Ice Machine Company.

BAKER ICE MACHINE COMPANY,
By BROME AND BROME AND
MEANS & ARCHER, *Its Attorneys.*

Filed in the District Court on March 11th, 1913.

Petition for Review.

To the Honorable the Judge of the District Court of the United States for the District of Kansas, First Division:

Your Petitioner, the Baker Ice Machine Company, respectfully represents to the Court that on the 27th day of August, 1912, it filed in this Court in this proceeding its intervening petition, setting forth the fact that it was the owner, and entitled to possession of certain refrigerating machinery now held by the Trustee, and claimed by him to be a part of the estate of the Bankrupt, and praying for an order that said Trustee be required to surrender said machinery to your Petitioner forthwith, or in lieu thereof that he pay to your Petitioner the sum of \$2738.86 being the balance due your Petitioner on account of the purchase price of said refrigerating machinery. That on the 15th day of February, 1913, Hon. E. R. Adams, the Referee before whom such application was heard, entered an order disallowing and denying said petition.

Your Petitioner shows to the Court that said order and judgment of said Referee was and is erroneous in this:

First. The Referee erred in finding "that in order to meet the drafts above mentioned, Grant Brothers, on November 15th, 1911, borrowed of the First National Bank, of Horton, Kansas, the sum of \$2500, and executed a note and mortgage to the First National Bank on all of said ice machinery to secure the payment of said
29 note, which chattel mortgage was filed in the office of the register of deeds of Brown County, Kansas on November 17th, 1911."

Second. The Referee erred in finding "that on the 5th day of February, 1912, Roy Grant and Carl Grant told said G. K. Williams that they were unable to pay the note of \$500.00, which had become due the Baker Ice Company on February 1st, 1912, and told said G. K. Williams that they had borrowed all the money they could borrow and that they had executed to the First National Bank, of Horton, Kansas, a chattel mortgage on said machinery to secure the money by them borrowed from said bank."

Third. The Referee erred in finding "that between the 5th day of February, 1912, and the 15th day of May, 1912, Grant Brothers wrote the Baker Ice Company numerous letters, advising them that they were unable to pay said \$500.00 note, which had become due February 1st, 1912, and said \$600.00 note, which had become due April 20th, 1912, and further advising said Baker Ice Company that they had borrowed all the money that they could borrow."

Fourth. The Referee erred in finding "that on the 15th day of May, 1912, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent, and that by filing the conditional sale contract in the office of the register of deeds of Brown County, Kansas, it would effect a preference to the Baker Ice Company over the other creditors of said firm of Grant Brothers."

Fifth. The Referee erred in finding "that the firm of Grant Brothers retained possession of said ice plant machinery until the receiver in bankruptcy took possession of the same on July 3rd, 1912."

Sixth. The Referee erred in finding "that said conditional sale contract was governed by the laws of the State of Kansas."

Seventh. The Referee erred in finding "that on May 15th 1912, at the time of the filing of said conditional sale contract in the office of the register of deeds of Brown County, Kansas, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent and that the effect of the filing of said contract would be to prefer the Baker Ice Company over the other creditors of Grant Brothers."

Eighth. The Referee erred in finding "that the filing of said conditional sale contract by the Baker Ice Company in the office
30 of the register of deeds of Brown County, Kansas, on the 15th day of May, 1912, constituted a voidable preference within the meaning of the Bankruptcy Act."

Ninth. The Referee erred in disallowing and denying the intervening petition filed by your Petitioners in said proceeding.

That your Petitioners excepted to each of the several findings and judgment of said Referee in said proceeding at the time the same were made.

Wherefore, your Petitioner prays that said order of said Referee be reviewed, reversed, vacated, and held for naught, and that the Trustee of said estate be by the order of this Court required to deliver said refrigerating machinery to your Petitioner, or in lieu thereof, if he elects so to do, be required to pay your Petitioner the sum of \$—, with interest thereon from the — day of —, 1912.

BAKER ICE MACHINE COMPANY,
By BROME AND BROME AND
MEANS AND ARCHER,

Its Attorneys.

Filed in the District Court on March 11th, 1913.

Memoranda of Decision on Review of Question Certified by Referee.

The facts are, by written contract, dated October 14, 1911, made and entered into between the parties at the City of Omaha, Nebraska, The Baker Ice Machine Company, claimant, sold the bankrupts an ice machine apparatus F. O. B. cars that city to be installed by claimant and used by Bankrupts in the manufacture of ice in the City of Horton, this State. The contract is one of conditional sale reserving title to the vendor until purchase price is fully paid. A part of the purchase price was paid by Bankrupts on delivery of the ice machine, but a balance of \$2800.00, evidenced by

promissory notes, remains unpaid. This conditional sale contract was not filed for record until May 15, 1912, at which time the bankrupts were insolvent, as claimants had good reason to believe and know as shown by the proofs. In July 1912, and within four months next succeeding the filing and registering of this contract in the appropriate office to impart constructive notice of its contents as by the laws of this state provided, this proceeding in bankruptcy was instituted and ripened into an adjudication. The claimant has presented its claim against the estate, demanding it be allowed to

31 recover the ice machine from the possession of the receiver for the balance due thereon under the terms of the contract. This application, on full hearing before the referee as master, was disallowed. This order of disallowance is certified here for review.

As the property in dispute under the terms of the conditional sale contract, (while the contract was entered into by the parties in the State of Nebraska) was to be located and used by the Bankrupts in the City of Horton, this State, and was to there be installed and started in operation by the claimant, it is clear any contract affecting the title thereto or establishing a lien thereon by law required to be filed for record to impart constructive notice to the world of its contents must be filed and recorded in that county of this State, under its laws, wherein the parties intended the property should be situate and used. Wharton on Conflict of Laws, Sec. 355; Hammon on Conditional Sales, p. 252; Denny vs. Bennett, 128 U. S. 489; Harvey vs. Locomotive Co. 93 U. S. 664; In re Legg, 96 Fed. 326.

In Mattley vs. Geisler, 187 Fed. 970, the Amendment to the Bankruptcy Act of 1910, which makes the instrument required to be recorded speak from the date of its recording and not from the date of its making, it was by the Circuit Court of Appeals, this Circuit, said:

"We need not consider the claim that the mortgage was fraudulent and void under the state law, for we think the court erred in holding there was no voidable preference. By the amendment of 1903 (Act Feb. 5, 1903, c. 487, Sec. 13, 32 Stat. 799 (U. S. Comp. St. Supp. 1909, p. 1314) there was added to section 60a of the Bankruptcy Act defining preferences the clause:

"Where a preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required."

"In First Nat. Bank vs. Connett, 73 C. C. A. 219, 142 Fed. 33, we held that the term "required" had reference to the character of the instrument of transfer, rather than to the particular persons who might or might not be affected by the withholding of it from the records. Under the amended section an instrument of transfer required to be recorded or registered speaks at the time the requirement is complied with, and not at the time of its execution. A failure to record or register when required may entail a consequence which does not result from the state law alone. A transfer, good as to the bankrupt and his general creditors while not of record, may nevertheless be voidable as to the trustee, representing them, if the instrument be of a class required to be recorded or registered. The amendment was directed against secret

liens, and was intended to change the rule of the prior decisions upon that subject. This construction has been approved in *English vs. Ross* (D. C.) 140 Fed. 630; *Loeser vs. Trust Co.* 78 C. C. A. 597, 148 Fed. 975; in *re Reynolds*, 153 Fed. 295; In *re Beckhaus*, 100 C. C. A. 561, 177 Fed. 141. It was held in the *Connett* case that under the statute and decisions of the courts of Missouri the chattel mortgage in question was fraudulent and void as to creditors represented by the trustee in bankruptcy. In that particular the case rested upon the law of Missouri, and is not pertinent here. But it was also held irrespective of such invalidity, that the statute of the state "required" the recording of chattel mortgages within the intent of the amended section 60a of the Bankruptcy Act, and that a voidable preference was obtained."

The question therefore here presented is; Do the laws of this state require the conditional sale contract in dispute shall be recorded to render it valid as against the trustee in bankruptcy representing all creditors and parties interested in the estate alike?

Sec. 44, Chapter 82, Gen. Stat. Kansas 1909, provides, as follows:

"That any and all instruments in writing or promissory notes now in existence or hereafter to be executed, evidencing the conditional sale of personal property, and that retains the title of the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county wherein the property be kept, and shall be entered upon the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is fully paid, without the renewal of the same by the vendor; and any conditional verbal contract reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value."

It must be held while the contract in dispute was prior to the date of its filing for record (May 15, 1912) valid as between the claimant and the bankrupts and their general creditors, for want of recording it was invalid as to the trustee, and as to him it only came into existence as of that date. As on this date it was placed of record for the purpose of securing the balance of an existing indebtedness owed by the bankrupts, as this date was within
33 four months next preceding the institution of this proceeding in bankruptcy, and as the result of its enforcement as written would operate to secure to claimant either the entire ice machine in satisfaction of a portion only of its purchase price or in the payment of the demand of claimant in full, while other claimants will receive a portion only of their provable demands, it must be held the decision of the referee or master is right and must be confirmed.

It is so ordered.

JOHN C. POLLOCK, *Judge*.

Kansas City, Kansas, April 29, 1913.

Filed in the District Court on April 29th, 1913.

Petition for Rehearing.

Comes now Baker Ice Machine Company, and represents to the Court that on the 27th day of August, 1912, it filed in this Court in this cause its intervening petition, claiming to be the owner and entitled to the immediate possession of a certain ice machine and refrigerating apparatus, then in the possession of the Trustee in Bankruptcy of the above entitled cause, and claimed by him to belong to, and be a part of, said bankrupt estate.

That thereafter, and on the 15th day of February, 1913 said intervening petition was heard before Hon. E. R. Adams, a Referee in Bankruptcy of this Court, and judgment entered in said proceeding by said Referee in favor of the Trustee, and against Baker Ice Machine Company.

That thereafter a petition to revise and review the decision of said Referee in said matter was filed in this Court by said Baker Ice Machine Company, and on the 29th day of April, 1913, a judgment was entered in this Court confirming the judgment and decision of said Referee.

That said judgment and decision was and is erroneous in this, that it appears from the evidence in said cause without contradiction that the conditional contract under which your Petitioner claims was filed for record prior to the date when proceedings in bankruptcy were instituted, that the bankrupt never had title to

34 the property in controversy, and that the filing of said contract, and the taking possession of said ice machine and refrigerating machinery and apparatus by said Baker Ice Machine Company, prior to the commencement of said bankruptcy proceedings, did not, and could not, as a matter of law, constitute a preference under the Bankruptcy Laws of the United States.

Wherefore, your Petitioner prays that a re-hearing be granted herein; that the said judgment and order be vacated and set aside; and that your Petitioner be restored to all things that it has lost by reason thereof.

BAKER ICE MACHINE CO.,
By H. C. BROME,
CLINTON BROME,
Its Attorneys.

Filed in the District Court on May 24th, 1913.

Decree.

Now on this 2nd day of June, 1913, this cause came on to be heard on motion of the Baker Ice Machine Company claimant for a rehearing of the order heretofore made by this court refusing and denying the intervening petition of said Baker Ice Machine Company and their claim. That the refrigerating machinery held by the trustee in this case should be surrendered to the claimant Baker Ice Machine Company. The Intervener Baker Ice Machine Com-

pany being represented by H. C. Brome, its attorney and the trustee in bankruptcy by W. S. McClintock, his attorney and the court entertains said motion for rehearing and having heard the arguments of counsel and being fully advised in the premises.

It is ordered and adjudged by the court that the order of the referee denying the right of said Baker Ice Machine Company to recover from the trustee the said refrigerating machinery be and the same is hereby approved and affirmed, to which ruling and judgment of the court the intervener Baker Ice Machine Company at the time excepted.

And thereupon said cause came on for further hearing upon the application of the intervener Baker Ice Machine Company for an allowance of an appeal from the order of this court confirming the decision of said referee and denying the right of intervener Baker Ice Machine Company to recover said refrigerating machinery from said trustee, to the United States Circuit Court of Appeals for the Eighth Circuit. That the intervener has lodged with the clerk of this court an Assignment of Errors in due form and said appeal is accordingly allowed. And the clerk of this

35 court is accordingly directed to transmit a duly certified transcript of the record and proceedings to said United States Circuit Court of Appeals for the Eighth Circuit within sixty days from this date in the manner provided by law.

It is further ordered that intervener execute a bond with sufficient surety conditioned in the sum of \$1000.00 conditioned for the payment of all costs and damages said bankrupt estate may sustain by reason of said appeal, such bond to operate as a supersedeas bond and the trustee in bankruptcy being directed to retain in his hands said refrigerating machinery or the proceeds thereof until the final determination of said appeal.

JOHN C. POLLOCK, *Judge.*

Filed in the District Court on June 2nd, 1913.

Assignment of Errors.

Comes now Baker Ice Machine Company, claimant and intervener in the above entitled cause, and assigns the following errors in the record and proceedings of said cause, to-wit:

First. The court, by its judgment and decree entered herein on the 2nd day of June, 1913 erred in its finding and judgment that the Baker Ice Machine Company, intervener and claimant herein, was not entitled to the possession of the ice machine and refrigerating machinery in controversy, and in affirming the judgment and order of the Referee in that behalf.

Second. The court erred in finding as matter of law that the filing for the record of the conditional contract prior to the date when the petition in bankruptcy was filed, but within less than four months from such date, constituted a preference under the Bankruptcy Laws of the United States.

Third. The Court erred in finding that Intervener, Baker Ice Machine Company, had good reason to believe, and know, that the

bankrupts were insolvent at the time the conditional sale contract was filed for record on May 15th, 1912.

Fourth. The Court erred in failing and refusing to find that Intervener, Baker Ice Machine Company, was in manual possession of the property in controversy at the time the petition in bankruptcy was filed.

Fifth. The Court erred in affirming the order and judgment of said Referee, for that it appears from the evidence and record in said cause that said conditional contract was filed, and that
36 Intervener by its agent, was in possession of the property in controversy at the time the petition in bankruptcy was filed; and further appeared that the bankrupts never had title to the property in controversy, and did not, and could not, grant an unlawful preference with reference thereto, for that the legal title to said property, and the ownership thereof, was in Intervener at all times.

Wherefore, Intervener prays that said judgment of said District Court be reversed, and that Intervener be restored to all things it has lost by reason thereof.

BAKER ICE MACHINE COMPANY,
By BROME & BROME, *Its Attorneys.*

Filed in the District Court on June 2nd, 1913.

Bond on Appeal.

Know All Men By These Presents: That we Baker Ice Machine Company as principal and the Title Guaranty & Surety Company of Scranton, Pennsylvania as surety are held and firmly bound unto J. F. Bailey, Trustee in bankruptcy in the above entitled cause in the penal sum of One Thousand Dollars (\$1000.00) for the payment of which well and truly to be made we bind ourselves, our heirs and assigns.

The condition of the above obligation is as follows:

Whereas, the said Baker Ice Machine Company is about to prosecute an appeal to The United States Circuit Court of Appeals for the Eighth Circuit from the judgment and decree of this court entered on the 2nd day of June, 1913, affirming the action of the referee in bankruptcy and denying the right of said intervener Baker Ice Machine Company to recover certain refrigerating machinery from said trustee.

Now therefore if said intervener Baker Ice Machine Company principal herein shall pay all costs and damages that said J. F. Bailey, trustee in bankruptcy, or said bankrupt estate shall sustain by reason of said appeal if said decree be affirmed then and in that event this obligation to be null and void; otherwise to be and remain in full force and effect.

BAKER ICE MACHINE COMPANY,
By H. C. BROME, *Its Attorney, Principal.*
THE TITLE GUARANTY AND

[SEAL.]

SURETY COMPANY,
By R. M. LEE, *Attorney in Fact, Surety.*

This bond approved by me this June 2nd, 1913.

JOHN C. POLLOCK, *Judge.*

Filed in the District Court on June 2nd, 1913.

37

[Precipe.]

To the Clerk of the United States District Court for the District of Kansas:

Please make transcript for U. S. Circuit Court of Appeals for the Eighth Circuit in the above entitled cause containing, to be printed under supervision of Clerk Court of Appeals.

- 1st. Original Petition in bankruptcy, omitting schedules.
- 2nd. Order of Adjudication.
- 3rd. Petition of Baker Ice Machine Company as intervener.
- 4th. Answer of Grant Brothers to petition of Baker Ice Machine Company as interveners.
- 5th. Certificate of question for review.
- 6th. Order disallowing intervening petition.
- 7th. Exceptions Baker Ice Machine Company.
- 8th. Petition for Review.
- 9th. Memoranda of decision on question for review.
- 10th. Petition for rehearing.
- 11th. Final decree.
- 12th. Assignment of Errors.
- 13th. Bond.
- 14th. Original Citation.

BROME & BROME,
Attorneys for Appellant.

Filed in the District Court on June 2nd, 1913.

(Clerk's Certificate to Transcript.)

UNITED STATES OF AMERICA,
District of Kansas, ss:

I, Morton Albaugh, Clerk of the District Court of the United States of America, for the District of Kansas, do hereby certify the within and foregoing to be true, full and correct copies of that part of the record and proceedings, in a cause pending in said court, In the Matter of Grant Brothers, In Bankruptcy, Case No. 1525 and that part of the record and proceedings in a cause pending in said court on Certificate of Question for Review by the Baker Ice Machine Company, In the Matter of Grant Brothers, bankrupt-, Case No. 1417 as is called for by appellant's [precipe] herein.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court, at my office in Topeka, in said District of Kansas, this 13th day of June, 1913.

[Seal U. S. District Court, District of Kansas, 1861.]

MORTON ALBAUGH, *Clerk.*

Filed Jun- 21, 1913. John D. Jordan, Clerk.

39 (*Appearance of Counsel for Appellant.*)

United States Circuit Court of Appeals, Eighth Circuit.

No. 3991.

BAKER ICE MACHINE COMPANY, Appellant,

VS.

J. F. BAILEY, Trustee in Bankruptcy in the Matter of Grant
Brothers, Bankrupts.

The Clerk will enter my appearance as Counsel for the Appellant.

H. C. BROME,
Omaha, Nebr.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, June 21,
1913.

(*Appearance of Counsel for Appellee.*)

The Clerk will enter my appearance as counsel for the Appellee.

W. S. McCLINTOCK,
A. L. QUANT,
Both Mulvane Bldg., Topeka, Kansas.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, July 28,
1913.

(*Order of Submission.*)

September Term, 1913.

THURSDAY, October 2, 1913.

This cause having been called for hearing in its regular order, argument was commenced by Mr. H. C. Brome for appellant and concluded by Mr. W. S. McClintock for appellee.

Thereupon, this cause was submitted to the Court on the transcript of record from said District Court and the briefs of counsel filed herein.

40

(Opinion.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, A. D. 1913.

No. 3991.

BAKER ICE MACHINE COMPANY, Appellant,
vs.

J. F. BAILEY, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupts, Appellee.

Appeal from the District Court of the United States for the District of Kansas.

Mr. H. C. Brome (with whom Mr. Clinton Brome was on the brief), for appellant.

Mr. W. S. McClintock (with whom Mr. A. L. Quant was on the brief), for appellee.

Before Hook and Carland, Circuit Judges, and Van Valkenburgh, District Judge.

CARLAND, *Circuit Judge*, delivered the opinion of the Court:

This is an appeal from an order made by the district court affirming an order of the Referee in Bankruptcy which denied the petition of the Baker Ice Company to have certain property delivered to it by the Trustee in Bankruptcy. The facts which control the decision of the case are as follows:

October 14, 1911, the Baker Ice Company of Omaha, Neb., entered into a written agreement with one Grant for the manufacture and delivery at Horton, Kansas, of certain ice making and refrigerating machinery, it being expressly agreed in the contract of sale that the legal title to and the legal possession of the machinery sold should be and remain in the Baker Ice Company until the purchase price was paid. The installation and delivery of the machinery was completed February 5, 1912. The conditional sale contract was filed for record in the office of the register of deeds of Brown County, Kansas, the county in which such machinery was delivered and installed, on May 15, 1912. On July 11, 1912, Grant, and the other members of the firm of Grant Brothers, to which firm the machinery had been delivered by direction of the Grant who executed the contract of sale, filed a voluntary petition in bankruptcy and were thereafter adjudged bankrupts. Appellee Bailey, as trustee, took possession of the bankrupt estate, including the machinery in controversy. Thereupon, the Baker Ice Company, by intervening petition, prayed the delivery of the machinery to it, there having been a default in the payment of the purchase price in the sum of \$2,800.00. The referee in bankruptcy denied the petition and the district court affirmed the order.

The district court treated the conditional sale contract as a transfer effective May 15, 1912, the date of its filing, to secure an existing indebtedness and that this date being within four months of the time of the filing of the voluntary petition in bankruptcy,—July 11, 1912,—the transfer was void as a preference.

We think this was error and that the error arose from holding that the conditional sale contract operated as a transfer. Section 5237, General Statutes of Kansas, reads as follows:

"That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase-price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county wherein the property shall be kept, and shall be entered upon the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is wholly paid, without the renewal of the same by the vendor; and any conditional verbal sale of any personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value."

It was not intended to decide in *Bank of Commerce, etc. v. Carbondale Machine Company*, 195 Fed. 180, that a conditional sale contract was in fact a chattel mortgage under the above statute. The question for decision in that case was as to the priority of liens, and the above statute was cited and certain language used
42 in the opinion for the purpose of showing that the laws of Kansas required the conditional sale contract to be recorded as a chattel mortgage, or in the same manner as a chattel mortgage.

The contract in this case is a conditional sale contract. *Dunlop v. Mercer*, 156 Fed. 545 (8th Cir.); *In re Pierce*, 157 Fed. 755 (8th Cir.); *Monitor Drill Co. v. Mercer*, 163 Fed. 943 (8th Cir.); *Harkness v. Russell*, 118 U. S. 663; *Bryant v. Swofford Bros.*, 214 U. S. 279; *Big Four Implement Co., et al. v. Wright*, 207 Fed. 535 (8th Cir.).

We had occasion in *Big Four Implement Co., et al. v. Wright*, supra, to consider *Christy v. Scott*, 77 Kan. 257, and concluded that there was nothing in that case which decided that a conditional sale contract was a chattel mortgage. We said in that case:

"The only question that the court decided in that case was that a vendee in a conditional sale contract was liable on his promissory notes, although the creditor had retaken the property. * * *

"Conditional sale contracts have long been recognized in the law of Kansas. They were valid as to third persons, when there was no statute requiring them to be filed, while there was a statute requiring the filing of chattel mortgages. *Sumner v. McFarlane*, 15 Kan. 600; *Hall v. Draper*, 20 Kan. 137; *Standard Implement Co. v. Parlin & Orendorff Co.*, 51 Kan. 544; *Moline Plow Co. v. Witham*, 52 Kan. 185. The statutes of Kansas recognize the difference be-

tween a chattel mortgage and a conditional sale contract, by providing separate and different provisions for filing."

We further said in the same case:

"These being contracts of conditional sale, there is no foundation for the claim that the filing of them within four months of the bankruptcy constituted a preference. There could be no preference without a transfer by the bankrupt of his property. If there was a transfer in this case it is evidenced by these instruments dated December 8, 1910, and January 23, 1911. But they transferred no property of Bell. They expressly refrained from transferring any to him."

So in the case at bar, Grant Brothers never transferred the machinery to the Baker Ice Company because it had never been transferred to them. The whole transaction was entirely opposed
43 to a transfer from the debtor to the creditor, and this case must be ruled by our decision in the case of Big Four Implement Co. et al. v. Wright, *supra*, in which we approved of *In re Farmers' Co-operative Co.*, 202 Fed. 1005.

Judgment reversed, with direction to the trial court to cause the machinery in controversy to be delivered to the Baker Ice Company, unless the trustee in bankruptcy shall, within a time to be named, pay the balance due from Grant Brothers to the Baker Ice Company for the purchase price of the machinery.

Filed November 5, 1913.

44

(Decree.)

United States Circuit Court of Appeals, Eighth Circuit, September Term, 1913.

WEDNESDAY, November 5, 1913.

No. 3991.

BAKER ICE MACHINE COMPANY, Appellant,

vs.

J. F. BAILEY, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupts.

Appeal from the District Court of the United States for the District of Kansas.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the District of Kansas, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby, reversed with costs; and that the Baker Ice Machine Company have and recover against J. F. Bailey, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupt, the sum of — Dollars, for its costs in this behalf expended

and that the same be paid by the said Trustee out of any funds in his hands belonging to said bankrupt estate.

It is further ordered that this cause be, and the same is hereby, remanded to the said District Court with directions to cause the machinery in controversy to be delivered to the Baker Ice Machine Company, unless the Trustee in Bankruptcy shall, within a time to be named, pay the balance due from Grant Brothers to the Baker Ice Machine Company for the purchase price of the machinery.

November 5, 1913.

45 (*Request for Findings of Fact and Conclusions of Law.*)

To the Honorable the Judges of the Circuit Court of Appeals of the United States for the Eighth Circuit:

J. F. Bailey as trustee of the estate in bankruptcy of Grant Brothers, Bankrupts, the appellee above named, hereby gives notice that he intends to appeal to The United States Supreme Court from the judgment and decree of the above entitled court reversing the judgment and decree of the District Court of the United States for the District of Kansas, First Division, and prays this court to enter by order nunc pro tunc its findings of fact and conclusions of law herein required by general order in Bankruptcy number 36 of The United States Supreme Court.

W. S. McCLINTOCK,

A. L. QUANT,

*Attorneys for J. F. Bailey, Trustee of the Estate
in Bankruptcy of Grant Brothers, Bankrupts.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1913.

46 (*Opinion on Request for Findings of Fact and Conclusions of Law.*)

United States Circuit Court of Appeals, Eighth Circuit, December Term, A. D. 1913.

No. 3991.

BAKER ICE MACHINE COMPANY, Appellant,

vs.

J. F. BAILEY, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupts, Appellee.

Appeal from the District Court of the United States for the District of Kansas.

Mr. H. C. Brome and Mr. Clinton Brome for the appellant.
Mr. W. S. McClintock and Mr. A. L. Quant for the appellee.

Before Hook and Carland, Circuit Judges, and Van Valkenburgh,
District Judge.

Hook, *Circuit Judge*:

This was an intervention by the Machine Company in a bankruptcy proceeding asserting title and asking possession of machinery sold the bankrupt under a contract of conditional sale. It was a controversy arising in a bankruptcy proceeding within sec. 24a of the bankruptcy act, *Hewit v. Berlin Machine Works*, 194 U. S. 296. The trustee having prevailed below, the Machine Company came here by appeal. We recently decided the cause for the appellant, and the appellee desiring to appeal to the Supreme Court now requests findings of fact and conclusions of law according to General Order in Bankruptcy XXXVI. The request is denied. The General Order does not apply to appeals under 24a. *Knapp v. Milwaukee Trust Co.*, 216 U. S. 545; *Houghton v. Burden*, 228 U. S. 161.

Filed December 11, 1913.

47 (*Order Denying Request for Findings of Fact and Conclusions of Law.*)

December Term, 1913.

THURSDAY, December 11, 1913.

Upon consideration of the request of counsel for Appellee for findings of fact and conclusions of law under general order in bankruptcy No. 36, it is now here ordered that said request be, and the same is hereby, denied.

December 11, 1913.

(Petition for Appeal to Supreme Court U. S.)

The above mentioned appellee, J. F. Bailey, Trustee in Bankruptcy, in the matter of Grant Brothers, bankrupt, respectfully shows, that the above entitled cause is now pending in the
48 United States Circuit Court of Appeals for the Eighth Circuit and that a judgment has therein been rendered on the 5th day of November, A. D. 1913, reversing the decree of the District Court of the United States for the District of Kansas, First Division, and that the matter in said controversy in said suit exceeds \$2000.00 besides costs; that this cause is one in which the United States Circuit Court of Appeals for the Eighth Circuit has not final jurisdiction and that it is a proper cause to be reviewed by the Supreme Court of the United States on appeal.

Wherefore, J. F. Bailey, Trustee in Bankruptcy, in the matter of Grant Brothers, Bankrupts, appellee, prays an appeal be allowed him in the above entitled cause directing the clerk of the United States Circuit Court of Appeals for the Eighth Circuit to send the record and proceedings in said cause with all things concerning the same to the Supreme Court of the United States in order that the errors complained of in the assignments of errors herewith filed, by said appellants, may be reviewed, and, if error be found, corrected according to the laws and customs of the United States:

W. S. McCLINTOCK,

A. L. QUANT,

*Attorneys for J. F. Bailey, Trustee in Bankruptcy
in the Matter of Grant Brothers, Bankrupts, Appellee.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1913.

(Assignment of Errors on Appeal to Supreme Court U. S.)

And now comes J. F. Bailey, trustee in bankruptcy in the matter of Grant Brothers, Bankrupts, the above named appellee, by W. S. McClintock and A. L. Quant, its solicitors, and in connection with his petition for appeal herein, presents and files therewith his assignments of errors, as to which things and matters he says that the decree entered herein on the 5th day of November, 1913, is erroneous, to-wit:

49 1s. The firm of Grant Brothers and the individual members thereof being on May 15th, 1912, and ever since said date wholly insolvent, and the claim of Baker Ice Machine Company, being on said date, as well as prior thereto, wholly a pre-existing indebtedness, and wholly unsecured except for the conditional sale contract in controversy which prior to May 15th, 1912, was not on file in any public office, and since said Baker Ice Machine Company filed said conditional sale contract, on May 15th, 1912 in the proper office of the Register of Deeds for Brown County, Kansas, at a time when it had reasonable cause to believe that said firm of Grant

Brothers and the members thereof were insolvent, and that it was thereby receiving a preference over the other creditors of said bankrupts, and since said Baker Ice Machine Company did in fact then and thereby receive such preference the court erred in adjudging that the conditional sale contract in controversy did not constitute a transfer effective on May 15th, 1912, the date of its filing, and that The Baker Ice Machine Company did not then and thereby receive a preference voidable by J. F. Bailey, as the trustee of the estate in bankruptcy of Grant Brothers, Bankrupts.

2nd. The court erred in adjudging that the Baker Ice Machine Company did not receive a preference voidable by J. F. Bailey, as trustee of the estate of Grant Brothers, Bankrupts.

3rd. The court erred in adjudging that said conditional sale contract did not constitute a transfer effective as of the date of its filing, May 15th, 1912, and within four months next preceeding the date of the filing of the voluntary petition in bankruptcy by Grant Brothers, whereas it should have held that said contract was a transfer effective as of the date of its filing, May 15th, 1912, within the meaning of Section 1 subdivision (25) and Section 60 subdivisions *a* and *b* of the National Bankruptcy Act of 1898 as amended in 1910.

4th. The court erred in adjudging that the lien of said conditional sale contract was not voidable by J. F. Bailey as trustee of the estate in bankruptcy of Grant Brothers, Bankrupts, wher-as it should have held it to have been voidable by him as such trustee within the meaning of Section (47) forty seven subdivision *a*-2, section (60) subdivision- *a* and *b* and section (1) one subdivision 25 of the National Bankruptcy Law of 1898 as amended in 1910.

Wherefore J. F. Bailey, as trustee in Bankruptcy of the estate of Grant Brothers, Bankrupts, prays that the judgment and decree of the United States Circuit Court of Appeals for the Eighth Circuit, herein, may be reversed and that he may have an adjudication and decree in his favor as herein specified.

W. S. McCLINTOCK,

A. L. QUANT,

*Solicitors for J. F. Bailey as Trustee of the
Estate in Bankruptcy of Grant Brothers.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1913.

(Affidavit as to the Amount in Controversy.)

STATE OF KANSAS,
Shawnee County, ss:

A. L. Quant of Topeka, Shawnee County, Kansas, being first duly sworn on his oath, says; that he is one of the attorneys for J. F. Bailey, Trustee as aforesaid, and has been regularly employed as such attorney in the above litigation from its inception; that Baker Ice Machine Company and said trustee in bankruptcy on April

5th, 1913, entered into a stipulation which was filed in the matter of Grant Brothers, bankruptcy estate before the Referee in Bankruptcy, having charge thereof, whereby they agreed that the property in controversy should be sold and that the amount realized therefrom should stand in lieu of the said property. A true copy of said stipulation is hereto attached, marked Exhibit "A" and made a part hereof. That pursuant to said stipulation the property in-

51 involved in this present controversy was sold for the sum of \$2,800.00 and the said trustee in bankruptcy, pursuant to said stipulation, is holding said fund pending the final determination of this litigation. A letter signed by E. R. Adams, said referee in bankruptcy, which truthfully recites what has been done pursuant to said stipulation with the said property is hereto attached marked Exhibit "B" and made a part of this affidavit.

A. L. QUANT.

Subscribed and sworn to before me this 29th day of November, 1913.

My commission expires 12/29/14.

[SEAL.]

SYLVIA KETTERING,
Notary Public.

EXHIBIT A.

In the District Court of the United States for the District of Kansas, First Division.

In Bankruptcy. No. —.

In the Matter of GRANT BROTHERS et al., Consolidated, Bankrupts.

Stipulation.

It is hereby stipulated by and between the trustee in bankruptcy herein and The Baker Ice Machine Manufacturing Company, by their respective attorneys that the said trustee, may, pursuant to an order of the Referee in Bankruptcy herein, and subject to the approval of said Referee, sell either at public or private sale, the machinery and property claimed by the Baker Ice Machine Manufacturing Company in its intervening petition filed herein, and the proceeds derived from such sale shall be held in lieu of the property claimed by said intervenor, and shall abide the final result of all proceedings in the controversy now pending between said trustee and said intervenor.

This stipulation shall operate to transfer the claim of said intervenor from the property claimed in its intervening petition to the proceeds which shall be derived from the sale of the same.

52 This stipulation shall be without prejudice to the rights of either party to claim the proceeds realized from the sale of said property.

It is further stipulated that the trustee shall in the event of the

sale of said property, either at public or private sale, give the Baker Ice Machine Manufacturing Company or its attorneys, sufficient notice to enable it, or its attorneys to bid upon the said property, as a prospective purchaser, if it so desires.

In witness whereof the parties hereto have, by their attorneys, executed this stipulation this 5th day of April, 1913.

McCLINTOCK & QUANT,

Attorneys for said Trustee.

MEANS & ARCHER,

Attorneys for said Intervenor.

(Endorsed: "Filed April 7, 1913, E. R. Adams, Referee.")

EXHIBIT "B."

November 28, 1913.

Messrs. McClintock & Quant, Attorneys at Law, Topeka, Kansas:

In re Grant Brothers.

GENTLEMEN: As per your request over the phone I enclose herewith copy of stipulation entered into between the Trustee and the Baker Ice Company.

This stipulation was entered into after a notice had been mailed to all creditors on April 1, 1913, of a meeting to be held on April 12th to consider the sale of the ice plant machinery and equipment, free and clear of liens.

On April 12th, at the time of the meeting to consider the sale, an order was entered by the Referee directing a private sale, free and clear of all liens.

On April 23rd the Trustee filed his report of sale showing that he had sold the ice plant machinery and equipment to the Baker Ice Company for the sum of \$2,800.00.

53 On April 30th an order was entered by the Referee approving the above sale and the \$2,800.00 received by the Trustee, which amount he still holds awaiting the outcome of a litigation, as per the stipulation.

Very truly yours,

E. R. ADAMS,

Referee.

E.R.A/H.S.

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1913.

(Order Allowing Appeal to Supreme Court United States.)

It is hereby ordered that the appeal in the above entitled cause to The Supreme Court of the United States, be and hereby is allowed as prayed for by J. F. Bailey, as Trustee in Bankruptcy in the matter of Grant Brothers, Bankrupts, appellee.

Witness The Honorable William C. Hook, Judge of The Circuit Court of Appeals of the United States for The Eighth Circuit, this Second day of December, 1913.

WILLIAM C. HOOK,
*Judge United States Circuit Court of
Appeals, Eighth Circuit.*

(Endorsed:) Filed in U. S. Circuit Court of Appeals, Dec. 2, 1913.

54 United States Circuit Court of Appeals for the Eighth Circuit.

BAKER ICE MACHINE COMPANY, Appellant,
vs.

J. F. BAILEY, Trustee in Bankruptcy, in the Matter of Grant Brothers, Bankrupts, Appellee.

The United States of America, Eighth Circuit, to the Baker Ice Machine Company:

You are hereby cited and admonished to be and appear in the Supreme Court of the United States at the City of Washington, in the District of Columbia, thirty days after the date of this citation, pursuant to an appeal allowed and filed in the Clerk's office of the United States Circuit Court of Appeals, in the Eighth Circuit, wherein you, The Baker Ice Machine Company, is appellant and J. F. Bailey, as Trustee in Bankruptcy, in the matter of Grant Brothers, bankrupts, is appellee, to show cause, if any there be, why the decree rendered against the said appellee, as in said appeal mentioned, should not be corrected and why speedy justice ought not to be done the parties in that behalf.

Witness the Honorable William C. Hook, Judge of the United States Circuit Court of Appeals for the Eighth Circuit, this 2nd day of December, A. D. 1913.

WILLIAM C. HOOK,
*Judge United States Circuit Court
of Appeals, Eighth District.*

DISTRICT OF NEBRASKA, ss:

I hereby certify and return, that on the 3rd day of December, 1913, I received this Citation, and on the 3rd day of December, 1913, I served the same upon H. C. Brome, of the firm of Brome & Brome, Attorneys of Omaha, Nebr., at their office in the City of Omaha in Douglas County, State, and District of Nebraska, by delivering to and leaving with him a certified copy thereof, with all the indorsements thereon.

WM. P. WARNER,
*United States Marshal for the
District of Nebraska.*

By _____,
Deputy United States Marshal.

[Endorsed:] No. —. Supreme Court of the U. S., October Term, 1913. J. F. Bailey, Trustee in Bankruptcy, etc., Appellant, vs. Baker Ice Machine Company. Citation. Rec'd at marshal's office Dec. 3, 1913. Handed deputy Dec. 3, 1913. Filed Dec. 5, 1913. John D. Jordan, Clerk.

Marshal's Costs.

Service	\$2.00
Mileage
Expense
Total	\$2.00

Paid by Appellant.

55

(Clerk's Certificate.)

United States Circuit Court of Appeals, Eighth Circuit.

I, John D. Jordan, Clerk of the United States Circuit Court of Appeals for the Eighth Circuit, do hereby certify that the foregoing contains the transcript of the record from the District Court of the United States for the District of Kansas as prepared and printed under the rules of the United States Circuit Court of Appeals for the Eighth Circuit, under the supervision of its Clerk, and full, true and complete copies of all the pleadings, record entries and proceedings, including the opinions, had and filed in the United States Circuit Court of Appeals except the full captions, titles and endorsements omitted in pursuance of the rules of the Supreme Court of the United States, in a certain cause in said Circuit Court of Appeals wherein the Baker Ice Machine Company is Appellant and J. F. Bailey, Trustee in Bankruptcy in the Matter of Grant Brothers, Bankrupts, is Appellee, No. 3991, as full, true and complete as the originals of the same remain on file and of record in my office.

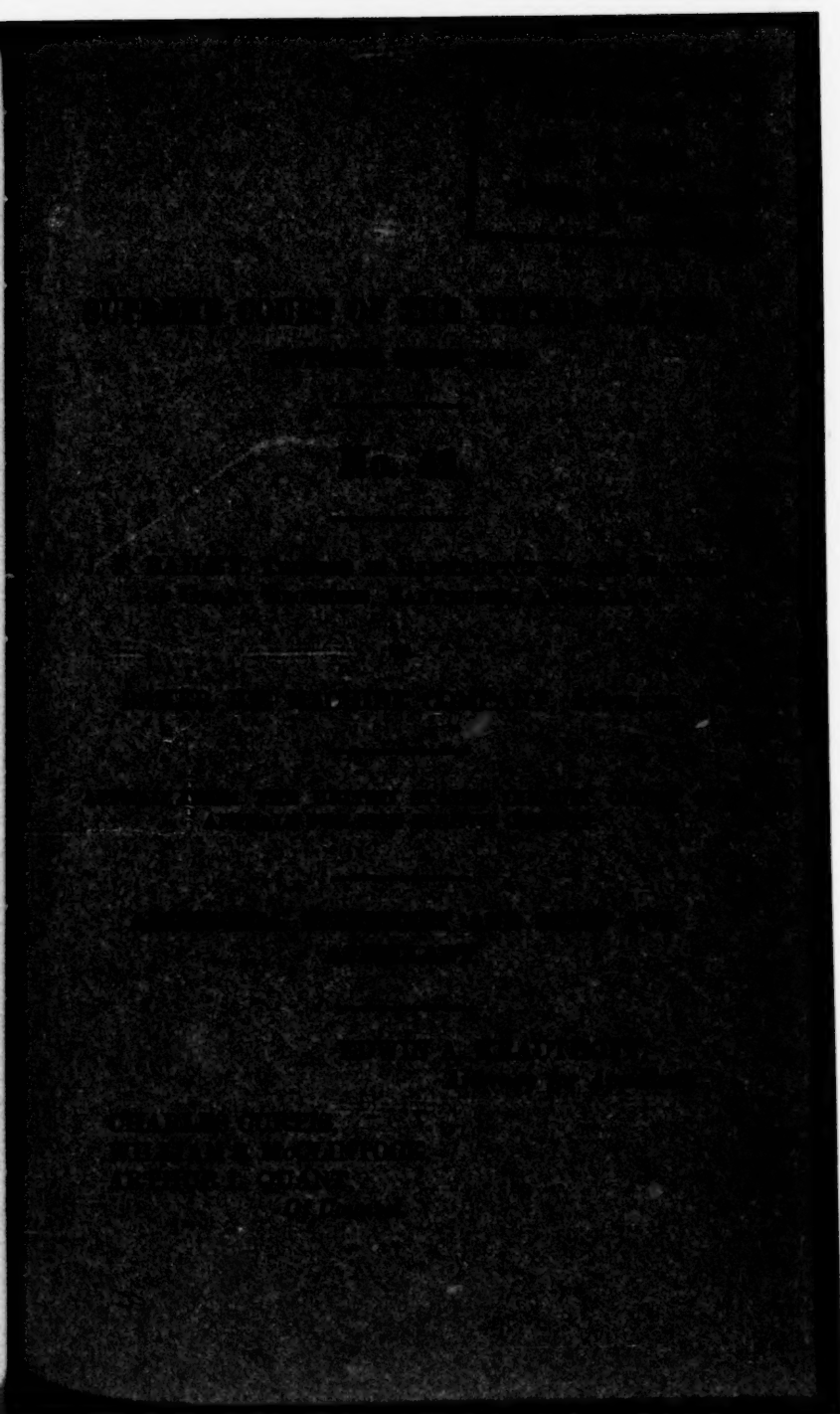
I do further certify that the original citation with the Marshal's return of service endorsed thereon is hereto attached and herewith returned.

In Testimony Whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Eighth Circuit, at office in the City of St. Louis, Missouri, this twenty-second day of December, A. D. 1913.

[Seal United States Circuit Court of Appeals, Eighth Circuit.]

JOHN D. JORDAN,
*Clerk of the United States Circuit Court
of Appeals for the Eighth Circuit.*

Endorsed on cover: File No. 23,993. U. S. Circuit Court Appeals, 8th Circuit. Term No. 321. J. F. Bailey, as trustee in bankruptcy in the matter of Grant Brothers, bankrupts, appellants, vs. Baker Ice Machine Company. Filed December 31st, 1913. File No. 23,993.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 42.

J. F. BAILEY, TRUSTEE IN BANKRUPTCY IN THE MATTER
OF GRANT BROTHERS, BANKRUPTS, APPELLANT,

vs.

BAKER ICE MACHINE COMPANY, APPELLEE.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE EIGHTH CIRCUIT.

**ADDITIONAL STATEMENT AND BRIEF FOR
APPELLANT.**

Statement.

The legal proposition, which the record in this case presents for solution, may be thus stated:

May one person sell and deliver to another personal property, under a contract in the form disclosed by this record whereby *inter alia* the purchaser becomes absolutely and in

all events bound to pay the purchase price therefor in full, the seller thereafter receive a considerable portion of the purchase price (in the case at bar \$3,200.14 on a total debt of \$5,940.00) and then claim, as against the trustee in bankruptcy of the purchaser, the possession of such property so sold and delivered, the ground of such claim being that in the contract for the sale and delivery of such property it was provided "that the legal title to and legal possession of the * * * (property in controversy) shall be and shall remain in the * * * (seller) until the * * * (purchaser) shall have fully and completely paid for the same";

It further appearing that the contract in question is to be governed by the laws of the State of Kansas; that in that State the statutes make invalid, as against creditors, unrecorded contracts of mortgage and conditional sale; that the contract was not filed for record until May 15, 1912, within four months prior to the filing of the petition in bankruptcy (July 11, 1912); that the property was delivered in November, 1911; that the purchaser did become, after the delivery of the property, and prior to May 15, 1912, the date of the recording of the contract, indebted to another than the seller in a considerable amount; and that the contract was recorded at a time when the seller "had reasonable cause to believe that * * * (the purchaser) was insolvent, and that by filing the (alleged) conditional sale contract * * * (for record) it would effect a preference to the * * * (seller) over the other creditors of * * * (the purchaser)";

It further appearing the contract in issue provided:

(a) The seller was given the right to file a statutory lien for the materials and labor furnished under the contract (Rec., 14) and the contract was stipulated to be notice of an intention to file a lien.

(b) "As soon as whole or any portion of the material for the machine— and plant is delivered on the premises of the part— of the second part (the purchaser) any loss or damage by fire or otherwise is to be borne by the said part— of the second part" (Rec., 13).

(c) That the purchaser should at his expense furnish a large portion of the labor and materials entering into and forming an integral part of a completed whole, "an ice-making and refrigerating plant," and that "the legal title to and the legal possession of *the machinery, apparatus and appurtenances* herein set forth" (meaning thereby, as appellant contends, to include therein all done thereon by the purchaser) "shall be and shall remain" in the seller until the purchaser shall have paid therefor in full (Rec., 13).

(d) That the purchaser executed, in addition to the contract, negotiable promissory notes, containing on their face no agreement of retention of title (Rec., pp. 15, 16) for a portion of the sum named in the contract as the purchase price, paying the balance thereof in cash (Rec., p. 5).

The United States Circuit Court of Appeals for the Eighth Circuit answered the question stated in the affirmative. The conclusion stated was reached by this process:

The contract in question (Rec., pp. 7-16) was held to be one of conditional sale (Rec., p. 34).

It was held the title had not passed from the seller to the purchaser, and that it could not be claimed, within the meaning of the bankruptcy act, that the purchaser transferred anything to the seller. "So in the case at bar, Grant Brothers (the bankrupts) never transferred the machinery to the Baker Ice Machine Company (the intervener) because it had never been transferred to them" (Rec., p. 35).

The trustee in bankruptcy of Grant Brothers, the purchaser, appeals to this court and contends:

(1) The contract in question in this case, though approved at Omaha, Neb. (Rec., 15), contemplated the shipment to and installation of machinery in the State of Kansas; hence the contract, as to its invalidity for delay in recording, is governed by the registration statutes of Kansas.

(2) There being in force in Kansas a statute providing (section 5237 of the General Statutes of Kansas, 1909):

"That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county wherein the property shall be kept, and shall be entered upon the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is wholly paid, without the renewal of the same by the vendor, and any conditional verbal sale of any personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value;"

It is clear, the contract in question being dated October 14, 1911, and not having been filed for record in Kansas until May 15, 1912 (Rec., 21), that if prior to the filing for record of the contract a creditor of the bankrupt had levied a writ of attachment or execution upon the property, then, as against such levy, the unrecorded contract would be invalid (*Paul vs. Lingenfelter*, 89 Kansas, 871).

(3) Under section 47a, subdivision 2, National Bankruptcy Law, as amended June 25, 1910, which provides:

SECTION 47. "And such trustee (in bankruptcy), as to all the property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon;"

the trustee in bankruptcy is entitled to all the "rights, remedies, and powers of a creditor holding a lien by legal

* * * proceedings" on the property as if such lien had attached prior to the filing for record of the contract.

(4) Assuming the contract to be technically one of conditional sale, yet nevertheless, at the time of the filing for record of the contract, there was a substantial interest of a property nature in the machinery in question vesting in the bankrupt. If at the time of the filing of the petition in bankruptcy the contract had not been recorded, the contract, as against the trustee in bankruptcy, would clearly have been invalid. Hence the filing of the contract for record did operate as a transfer of property from the bankrupts to the alleged conditional vendor. It appearing at the time of the record the bankrupts were insolvent, and the conditional sale vendor at the date of recording had reasonable cause to believe the effect of the recording of the instrument would be to enable the conditional sale vendor to collect a greater percentage of his debt than any other of the creditors of the bankrupts of the same class as the conditional sale vendor whose contract had theretofore not been recorded, then such recording is invalid as against the trustee in bankruptcy as a voidable preference.

(5) The contract in controversy (Rec., pp. 7-16) is in effect a chattel mortgage.

The contract is to be interpreted, not in the light of any name given to it by the parties, nor indeed according to any provision therein, segregated and considered apart from the instrument in which it is found. The contract is to be taken in all its parts, by the four corners thereof, and, giving effect to all its terms and the intention of the parties as thereby and the surrounding circumstances disclosed, did it create a lien by way of security for a debt, hence a mortgage, or was it a retention of title, the title not to pass until the performance by the purchaser of a condition subsequent? Being a chattel mortgage, its recording in the circum-

stances detailed in the last preceding paragraph is clearly voidable as a preference.

(6) Between the date of the alleged conditional sale contract, October 14, 1911, and the recording thereof, May 15, 1912, that is, in the month of November, 1911, First National Bank of Horton, Kansas, extended credit to the bankrupts to the amount of \$2,500 (Rec., 21). The trustee is clearly entitled, in the right of this creditor, to claim this as prior to any lien or effect of the recording of the agreement, be it held a chattel mortgage or a contract of conditional sale.

(7) In any event the Circuit Court of Appeals of the Eighth Circuit clearly erred in peremptorily directing a return of the machinery in question to the intervener (Rec., 35), thereby ignoring the outstanding mortgage claimed in favor of First National Bank of Horton, Kansas (Rec., 21). The rights claimed by that mortgagee should be determined, and to that end, if affirmed, the decree of the Circuit Court of Appeals should be so modified as to permit the bank to have its claim determined, and if the alleged chattel mortgage is superior to the alleged contract of conditional sale, the property should go to the mortgagee.

(8) Being a contract of mortgage, under General Statutes of Kansas, 1909, section 5224, it was invalid as against creditors of the debtor unless and until recorded.

(9) Under the amendments to the National Bankruptcy Law, approved June 25, 1910, the trustee in bankruptcy, as to all property in his possession, has all the right of a creditor, to impugn the validity of the contract because not filed for record as required by statute.

(10) As the validity of the contract, the same not having been theretofore filed for record, speaks as against the trustee

in bankruptcy from the date of its filing, and as on the date of the filing thereof, the firm afterward adjudicated bankrupt was insolvent, and the person benefited by the filing for record on that date, had reasonable cause to believe the elements constituting a preferential transfer, no right to reclaim the machinery could arise from such filing.

(11) Assuming the contract is construed as one of conditional sale, under General Statutes of Kansas, 1909, section 5237, if the same had never been filed of record, then intervenor as against the trustee in bankruptcy could not take the machinery out of his possession.

(12) In any event, it must be claimed it is the filing which is the basis of the right to reclaim. Hence the *filing for record* must, in order to have any effect at all, be treated as a transfer from the creditors of the purchaser, or the trustee in bankruptcy thereof, to the seller, of their right to complain of the non-filing for record of the contract. At the time of this transfer the elements constituting a voidable preferential transfer existed. Hence no rights were created by filing the contract of record.

(13) The question at issue is one not of the interpretation, as between the parties thereto, of the precise meaning of the terms of a contract in writing. The contract is an incident in the course of a commercial transaction, and that transaction is this: So far as third parties were concerned, machinery was sold, delivered, and installed in such a manner as to clothe the purchaser with all the indicia of ownership. As between the parties, secretly and not of record, a contract attempted to reserve the title in the purchaser. Possession implies ownership. Upon the faith of the apparent ownership of the machine in controversy by the purchaser, third persons are justified in extending credit to the purchaser. Credit is the basis of practically all our commerce. This is

readily understood when we compare the volume of our circulating medium with the volume of business transacted. Eliminate credit and place commerce on a cash basis, and the greater part of its activity would be at an end. Our national development is commercial in its nature. It is commerce which makes a nation great; the decline and fall thereof marks the decline and fall of the nation.

Indeed our governmental activity, the creation of a Federal reserve system, where credit becomes a basis of currency; of a Federal Trade Commission to restore competitive conditions in trade; of an Interstate Commerce Commission, with its machinery and its regulations, the very questions which this court is called upon to determine, all evidence the fact that commerce, including the extension of credit, marks that continuity of mutual interest and dependency which realizes our national unity, prosperity, and welfare.

And in doing this no wrong is done the intervener. It should have filed the contract in question for record. Where one of two persons must suffer from the act of a third, the one should suffer who made possible the commission of the act. If the contract had been filed, third parties extending credit would have done so with their eyes open.

Statutes Applicable.

General Statutes of Kansas, 1909, section 5224:

"Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the register of deeds of the county where the property shall then be situated, or if the mortgagor be a resident of this State, then of the county of which he shall at the time be a resident."

General Statutes of Kansas, 1909, section 5237:

"That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sale of personal property, and that retain the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers or creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county where the property shall be kept, and shall be entered upon the records *the same as a chattel mortgage*, and when so deposited shall remain in full force and effect until the amount of the same is fully paid, without the renewal of the same by the vendor; and any conditional verbal sale of personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value.

"When the amount of the note or evidence of indebtedness referred to in section 1 shall have been fully paid by the vendee, the vendor shall release the same under the same terms, conditions *and penalties* as are now required by the law relating to chattel mortgages."

General Statutes of Kansas, 1909, section 5238:

"Any mortgagee named in a chattel mortgage, not being at that time the owner and holder of the debt secured by such chattel mortgage, who shall execute a release or satisfaction of such chattel mortgage, with the intent to defraud the mortgagor or the owner and holder of the debt secured," shall be deemed guilty of a felony.

The National Bankruptcy Law.

SECTION 1. (a) The words and phrases used in this act and in proceedings hereto shall, unless the same is inconsistent with the context, be construed as follows:

(25) "Transfer" shall include the sale and every other and different mode of disposing of or parting with property,

or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.

SECTION 47: "And such trustees (in bankruptcy), as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon."

SECTION 60a. A person shall be deemed to have given a preference, if being insolvent, he has within four months before the filing of the petition * * * made a transfer of any of his property, and the effect of the enforcement of such * * * transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.

(b) If a bankrupt shall have * * * made a transfer of any of his property and if at the time * * * of the recording or registering of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy * * * the bankrupt be insolvent and the * * * transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall have reasonable cause to believe that the enforcement of such * * * transfer would effect a preference, it shall be voidable by the trustee."

SECTION 67. *Liens.*—a. *Claims* which for want of record or for other reasons would not have been valid liens as against the claims of the creditors of the bankrupt shall not be liens against his estate.

OUTLINE OF BRIEF.

It is thought an outline of the brief, *post*, pp. 11 *et seq.*, may aid the court in an examination thereof.

The importance of a proper decision of the questions at issue has prompted counsel to treat the subject as fully as their apprehension extended. To aid the court, quotations have been made of such portion of the authorities as counsel thought necessary to present the point. In a few instances the court is asked to read the cases. In all other instances it is thought the portion quoted in the brief will suffice.

I.

The court will interpret the National Bankruptcy Act as if "intended for ready application to every-day affairs of business"; "statutes should be sensibly construed, with a view of effectuating the legislative intent"; commerce is a practical conception, "depending upon broader considerations than the existence of a technically binding contract or the time and place where the title passed," and the transaction in this case is to be treated "from the point of view of commerce," of which credit is the life-blood (Brief, pp. 12, 13).

II.

The right of a trustee in bankruptcy predicated of the right of a lien creditor to attack an unrecorded instrument is treated as one of local law (Brief, p. 12).

III.

The property in question having been intended for and actually shipped to Kansas and there installed, the law of that State, not Nebraska, where the contract was signed, governs the necessity of recording (Brief, pp. 13 *et seq.*).

In addition to the authorities on this subject cited in the brief (pp. 13 *et seq.*), the attention of the court is called to the following:

"After careful consideration of the opposing views which are clearly and forcibly expressed in the briefs of counsel for the respective parties, I conclude that the true rule, supported by the great weight of authority, is this: That while in general the validity of a chattel mortgage is to be determined according to the *lex loci contractus*, yet when the mortgaged property at the time of the execution of the mortgage is situated in a State other than that in which the mortgagor is domiciled and the mortgage executed, the question of the preservation of the lien acquired by the mortgage under the laws in reference to registration and the priority of such lien over the rights and interest subsequently acquired by third persons, is to be determined by the law of the State where the property is situated at the time the mortgage is executed."

In re Nichols, 201 Fed., 437, 439 (Sanford, J.).

In re Wall, 207 Fed., 994, 995, Judge Campbell approvingly quoted:

"Where a conditional sale is made in one State, which contemplates or expressly provides that the property is to be delivered or used in another State, the law of the latter State governs." Loveland on Bankruptcy, p. 448."

See 1 Loveland on Bankruptcy (4th ed.), sec. 406, p. 837.

In *Lanston Monotype Mach. Co. vs. Curtis*, 224 Fed., 403, 406, it is held (Lacombe, Ward, and Rogers, JJ.): "The contract having been executed in New York, and the Monotype Company not having exercised its right to cancel, the same is in our opinion a New York contract, to be governed by the law of that State. The parties evidently contracted with reference to the law of New York. The ma-

chinery was to be used there, and paid for there, and in case of the purchaser's default, the remedies of the vendor were to be availed of there. Hence, when the Monotype Company retook the chattels, it did so subject to the provisions of the New York law regulating conditional sales. Not having sold the machinery at public auction as required by that law, it was liable to Curtis for the amount paid by him on account."

In *Hart vs. Barney & Smith Mfg. Co.*, 7 Fed., 543, 549, it is ruled (Barr, J.): "In considering which law governs this controversy, we must look to the place of performance as contemplated by the parties to the contract, and also to the nature of the controversy. The cars were delivered in Ohio, and the cash payment made there, and the note was payable in Ohio. But the cars were delivered, to be taken to Kentucky and used on a railroad there, and the redelivery or reclamation of them was to be in Kentucky. The parties contemplated that part of the contract, if performed, was to be performed in Kentucky. The law of the place of performance would be the controlling law, ordinarily, even as between the parties to the contract. Here the question is whether property located in Kentucky and seized there is subject to seizure or whether a sale of this property made in Kentucky passed a valid title. We think there can be no doubt that the Kentucky law governs this controversy. If the authorities cited, or any of them, establish a contrary doctrine it has escaped me. In *Homans vs. Newton*, 4 Fed., Rep., 885, cited by the learned counsel upon another point, Judge Lowell said: 'It has, however, been held that one who buys chattels in Massachusetts of a vendor, whose own title is conditional, takes only what the law of Massachusetts would give him, even if at the place where the conditional sale was made the law would have upheld the title of an innocent purchaser. *Hischorn vs. Canny*, 98 Mass., 149.'

"In *Rogers' Locomotive Works vs. Lewis*, 4 Dill., 158, the court assumes that the Missouri law governed the question of whether or not the locomotives were liable to seizure under

an exemption against the railroad company, although the contract, which was very like this one, showed the locomotives were delivered in New Jersey. The Supreme Court has settled that question, and it is not, we think, open for discussion. *Green vs. Van Buskirk*, 5 Wall., 310; *Hervey vs. R. I. Locomotive Works*, 93 U. S., 664."

Dillon, Circuit Judge (orally): "Conceding that the instrument of lease was executed in Pennsylvania, and that as between the parties it does not show a sale of the engine, and that, aside from the Iowa statute (Code, 1873, §1922), the plaintiffs would have the superior right, I am of the opinion, in view of the express stipulation of the contract, that the locomotive was to be taken to Iowa and there used by the railroad company, that the Iowa statute controls the case and has the effect to subordinate the rights of the plaintiffs to the lien of the bank as pledgee."

Pittsburgh Loco. & Car Works vs. State National Bank, 19 Fed. Cas., 11198.

In re Legg, 96 Fed., 326, 327, Townsend, J., said: "It is settled by numerous decisions that, where such a contract contemplates or expressly provides that the property is to be delivered or used in another State, the law of the latter State prevails. *Hart vs. Manufacturing Co.*, 7 Fed., 543; *Pittsburgh Locomotive & Car Works vs. State Nat. Bank of Keokuk*, 19 Fed. Cas., 785 (No. 11,198); *Heryford vs. Davis*, 102 U. S., 235; *Chicago Ry. Equipment Co. vs. Merchants' Bank*, 136 U. S., 268, 280; 10 Sup. Ct., 999; *McGourkey vs. Railway Co.*, 146 U. S., 536; 13 Sup. Ct., 170."

In the foregoing cases, cited by Judge Townsend from the Supreme Court of the United States, the point is not expressly stated. But an investigation of the facts of each case discloses that in the solution of the problem presented the court did apply the laws of the State to which the property was shipped.

The contract in question having been signed in the State

of Nebraska, it becomes important to consider a decision of that State. Under the rule announced in the State where the contract was signed it is a Kansas contract.

"The contract between Meinen and the David Bradley Company was made in Council Bluffs, Iowa. No copy thereof was filed in the office of the clerk of Thayer County, where Meinen resided and carried on his business. It is insisted by appellant that the contract, being an Iowa contract, was not required to be filed in Thayer County in order to protect the David Bradley Company as against a purchaser or judgment creditor of Meinen; that a conditional sale of property made in Iowa, although to a resident of Nebraska, the property to be taken and used in Nebraska, does not come within the provisions of our statute requiring a conditional sale to be in writing, and signed by the vendee, and a copy thereof filed with the clerk of the county. We do not think that this position can be sustained. While it is true that the contract of conditional sale was made in Iowa, both parties thereto contemplated that it was to be performed in Nebraska. The goods were to be taken to Nebraska and there sold, and absolute title passed to the purchaser Meinen. Meinen was to remain in possession until a sale was made. The manifest purpose of our statute is to render ineffectual the condition in a sale of goods held in this State, where a copy of the contract of sale is not filed with the clerk of the county. The object of the statute is to get rid of secret and latent liens. Public policy, as asserted in the extension of our registry laws, requires that the public record shall show the ownership of personal property, and a construction which is favorable to that end should be given to the act. *Knowles Loom Works vs. Vacher*, 57 N. J. Law, 490; 33 L. R. A., 305."

Bradley & Co. vs. Kingman Impl. Co., 79 Nebr., 144, 145.

IV.

If prior to the filing for record of the contract in question a creditor of the bankrupt had acquired a lien through legal proceedings, then as against that lien the unrecorded contract, even if held to be one of conditional sale, would have been invalid as a reservation of title (Brief, p. 14). This much is conceded by counsel for appellee (Brief of Appellee, pp. 14, 15).

V.

Prior to the amendment of June 25, 1910, a trustee in bankruptcy was not accorded the status of a lien creditor. His status as a lien creditor is established by that amendment (Brief, pp. 14, 15).

VI.

The case at bar is governed by the amendment of June 25, 1910, the controversy being engendered of events having their inception in a contract executed in October, 1911 (Rec., 21). The amendment is to be construed in the light of the evil to be thereby remedied and in the recognition of the truth, "* * * the spirit maketh alive." 2 Cor., 3, 6 (Brief, pp. 15, 16).

VII.

The amendment of June 25, 1910, to section 47a, subdivision 2, has never been construed by this court. A number of cases from district courts and circuit courts of appeals are cited.

In three cases, *In re Flatland* (C. C. A., 9th Cir.), 196 Fed., 310; *In re Lansman* (Evans, J.), and *In re East End Mantel & Tile Co.* (Orr, J.), 202 Fed., 275, the amendment was construed to be inoperative unless, in fact, prior to the

bankruptcy there was a creditor actually holding a lien on the property in controversy. The great weight of authority, copiously quoted, is to the contrary, the status of the trustee being generally conceded to be *as if* there were a creditor holding a lien (Brief, pp. 18-33).

But in the case at bar this question arises: The contract, dated October 14, 1911, was filed May 15, 1912; the petition in bankruptcy, July 11, 1912 (Rec., 20-22).

Is the trustee in bankruptcy "a creditor holding a lien by legal or equitable proceedings" on the property in question:

(1) As of the date of the petition in bankruptcy, July 11, 1912, or

(2) As of a date prior to the recording, May 15, 1912?

Appellee intervener claims the first to be true (Brief of Appellee, pp. 14, 15). Appellant trustee in bankruptcy claims the law includes the second proposition stated.

In considering this question regard must be had to three separate phases thereof. These respective phases must be clearly distinguished, otherwise confusion will result.

To restate the case: An instrument executed in October, 1911, required by law to be recorded, was not in fact recorded until May 16, 1912, in circumstances avoiding the recording as a voidable preference. Between the date of the execution and the date of the recording, debts were incurred by the purchaser of the machinery.

Three questions, therefore, are presented:

The authorities are to the effect that, if prior to the recording of the instrument an attachment had been levied or if the instrument had not been recorded prior to the bankruptcy, the right of the trustee would clearly be superior to the right of the instrument. Accordingly, the first question which arises may be thus stated:

Do the rights of the creditor of the trustee "as a creditor holding a lien" relate to a date anterior the recording of the instrument?

In two cases cited in the brief—

Bank of North America vs. Penn. Motor Car Co., 235 Pa. St., 194;

Cornelius vs. Boling, 18 Okla., 469.

the doctrine of relation is applied and the trustee is given the right of a creditor holding a lien as of a date anterior to the taking of possession within the four months' period by the mortgagee. (It will be recalled that under the decisions the taking of possession is the equivalent of the act of recording.)

The question as to whether the recording of the instrument within the four months' period operated as a voidable preference and the question of the rights of the creditors who extended credit intermediate the date of the execution and the recording of the instrument are hereinafter treated.

There are cases cited in the brief in which an earlier date did not become important, and the rights of the trustee were held to "attach as if there were a creditor holding a lien at the date of the petition" (Brief, 38-41).

In one case an earlier date, becoming unimportant, the time was fixed as of the date of the adjudication (Brief, p. 41).

In other cases it was held that the rights of the trustee as a lien creditor did not antedate the filing of the petition (Brief, pp. 41-43).

The following cases in this court are cited—

Everett vs. Judson, 228 U. S., 474, 478, 479,

in which it was decided that the estate in bankruptcy is re- the adjudication the bankrupt died the rights of the trustee in bankruptcy in the policy of insurance were to be treated as of the date of the petition—

Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S., 300,

in which it was decided that the estate in bankruptcy is re- garded

"as in custodia legis from the filing of the petition" (Brief, pp. 43, 44).

It is pointed out in the brief that the Acme Harvester Company case presented a question of jurisdiction, and that *Everett vs. Judson* dealt with the date on which the title of the bankrupt passed to the trustee.

In the case at bar the question is not one of jurisdiction, nor one as to the title in the bankrupt. It is a question of the status of a trustee in bankruptcy as a creditor holding a lien.

Everett vs. Judson is, however, instructive in that it shows the court interpreted the rights of a trustee as antedating the adjudication and relating to the petition. The same power which enabled the court to thus interpret the question of policies of insurance enables the court in this case to interpret the amendment of June 25, 1910, in such a way as to give it operative force and effect.

In the brief counsel show that in the bankruptcy law as passed in 1898 there is a provision that the lien created by the action of a creditor within four months prior to the bankruptcy might be continued in force, the trustee in bankruptcy being

“subrogated to the rights of the holder of such lien and empowered to perform and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened” (Brief, p. 45).

If in order to protect the rights of the trustee as a creditor holding a lien it was necessary that in fact there should have been a creditor actually holding a lien prior to the date of the recording, then neither the amendment of 1903, noted in some of the cases, nor the amendment of June 25, 1910, accomplished any useful purpose.

Cases are cited showing the spirit in which recording statutes have been construed (Brief, pp. 46, 47).

VIII.

Taking the contract in issue in this case by its four corners and construing it in the circumstances in which it was made and with a view of effectuating the intent of the parties thereto (which is the rule of interpretation), it is clearly one of mortgage and not of conditional sale.

The contract is analyzed in detail (Brief, pp. 48-51).

The authorities laying down the rule of interpretation are quoted (Brief, pp. 51-64, 70-73). Kansas cases, construing contracts of conditional sale and chattel mortgage to be similar in some respects, are cited (pp. 64-65).

The case of *Big Four Impl. Co. vs. Wright*, 207 Fed., 535, the progenitor of *Baker Ice Mach. Co. vs. Bailey* (the case at bar), 209 Fed., 603, is dissected (pp. 65-70), including an analysis of the cases therein cited.

The terms of the contract are analyzed, this with the view of showing that under the terms of the contract the purchaser was compelled to furnish a number of items which became an integral part of the completed installation (Brief, pp. 74-76).

It is submitted, these terms of the contract are inconsistent with the idea of a conditional sale. It is not conceivable that a purchaser buying property on condition would sign a contract the legal effect of which is to forfeit to the seller the things which the purchaser himself provided. If the sale be strictly on condition, then the seller would have no right to take the property of the purchaser. The fact that it is possible for the seller to take the property of the purchaser is evidence that the transaction is in reality a mortgage and not a conditional sale.

In an effort to aid the court in interpreting the contract the attention of the court is called to the clause in the contract placing the risk of "loss or damage by fire or otherwise" on the purchaser as soon as the whole or any portion

of the material for the machine and plant is delivered on the premises of the purchaser (Brief, p. 76).

The authorities are to the effect that where property is destroyed the party in whom the title is vested must bear the loss, and that in the case of a conditional sale, where the title never passed to the purchaser, the risk of loss is on the seller (Brief, pp. 77 *et seq.*). There are cases to the contrary cited in the course of the brief (pp. 77 *et seq.*), but these are placed on the ground "the retention of title in the vendor was a mere security for the payment of the price" (Brief, p. 77).

IX.

As bearing on the interpretation of the contract, attention is directed to a provision in the contract in which it is expressly stipulated the seller should

"have the right to file a mechanics' lien for material and labor furnished under this contract, and this stipulation is declared to be notice * * * of the intention to file a lien" (Record, pp. 14, 15; Brief, pp. 81 *et seq.*).

The brief discusses the proposition that the provision quoted is

(a) An election to enforce the purchase price and inconsistent with the theory of a conditional sale;

(b) An admission that the property furnished became a part of the realty, for otherwise it could not be the basis of a mechanics' lien; having become a part of the realty, it could not be a basis of a conditional sale.

The authorities to the effect that the enforcement of the purchase price is an election on the part of the seller to pass the title to the purchaser are quoted (Brief, pp. 82-97).

There is an authority which is apparently to the contrary:

"It is also contended that the claimant lost all right it might have had under the contracts of con-

ditional sale by securing a mechanics' lien and attempting to foreclose it with demand for a money judgment. Supplementing this, it is further contended that the lien itself is void, and the claimant is therefore reduced to the rank of a general creditor who delayed too long in proving his claim. It should be observed that the lien sought by claimant was not alone on the articles sold under the contract, but extended to the real estate in which they were placed; also, that the trustees and general creditors suffered no loss or injury and changed no position because of the mechanics' lien or the effort to enforce it, and the claimant has gained nothing. *Bierce vs. Hutchins*, 205 U. S., 340; 27 Sup. Ct., 524; 51 L. Ed., 828, covers this part of the case. There was there a contract of conditional sale, mortgage bonds as collateral, the filing of a claim for lien, and an abortive attempt to enforce it; but it was held the contract survived. See, also, *Hooven vs. Featherstone*, 49 C. C. A., 229; 111 Fed., 81. The claimant has actually secured and enjoyed nothing that is inconsistent with its rights under the contracts. Its mechanics' lien could avail it little, for even if otherwise valid, which is doubtful, it appears that between the dates of the two contracts the bankrupt sold the real estate. The law is not such an exact science that rights and remedies are clear at all times, and it does not tend to justice to hold one strictly to a bare election between them where nothing has been gained and no one prejudiced. We think the claimant is entitled to the proceeds of the articles embraced in its contracts not exceeding, however, the amount the bankrupt was to pay, with interest."

Nauman vs. Bradshaw, 193 Fed., 350, 354 (Hook, Marshall, and Reed, JJ.).

But it will be recalled that in the case at bar there is an express agreement giving the seller the right to file a lien. In the case cited and in the principal case on which it relies—

Bierce vs. Hutchins, 205 U. S., 340,

it is pointed out that an election does not result from a unilateral act which results in no definite accomplishment.

But in the case at bar the act of which the claim of election is predicated is not unilateral. It is in the contract, which is the very basis of the asserted right, to reclaim the property. The intervener claiming under a contract is bound by all the terms thereof.

Cases are next cited showing that it is competent for the parties to a contract to agree that personalty attached to realty shall not become a part of the realty and *vice versa* (Brief, pp. 97, 98).

It is then contended that, the contract in the case at bar having affirmatively given the purchaser the right to file a mechanics' lien, a clear admission is made that the property which is the subject-matter of the controversy in this case did not remain personalty, but became a part of the realty; otherwise it could not be the basis of a mechanics' lien. (See authorities cited in Brief, pp. 98-109.)

If the property is treated as a part of the realty, the authorities cited are to the effect that it is not the basis of a contract of conditional sale.

In re Williamsburg Knitting Mills Co., 190 Fed., 871 (Brief, pp. 100, 101).

Contracts of conditional sale are predicated of the property being personalty. The law of mechanics' liens deals with things which have been furnished in such a way as to become a part of the realty.

X.

Notice that in the brief the question is discussed: the contract being dated October 14, 1911, not having been filed for record until May 15, 1912, the petition in bankruptcy having been filed July 11, 1912, the person filing the contract having at the time of the filing of the contract knowledge of the insolvency of the conditional purchaser, is the filing of the contract voidable as a conditional preference, and, if so, as of what date is the preference to be adjudged?

The court will recall that a trustee in bankruptcy may avoid a preference which became effective within four months prior to the filing of the petition in bankruptcy. In the court below it was held that the filing of the contract did not operate as a preference because no interest in the property ever passed to the conditional purchaser. This phase of the case is discussed in a later chapter in the brief.

Under Point X (Brief, pp. 110 *et seq.*) authorities are collected to the effect that in the case of a voidable preference evidenced by an instrument delayed in recording the date of the preference is to be calculated as of the date of the recording and not as of the date of the instrument.

Of the cases cited,

Mathews *vs.* Hardt, 80 N. Y. Supp., 462-469 (Brief, p. 125).

was approvingly cited in

Long *vs.* Farmers' State Bank, 147 Fed., 360 (Sanborn, Van Devanter, and Philips, JJ.),

in which last-named case the syllabus (p. 361) concludes:

"Where there had been no effective transfer of certain insurance money to a bankrupt's creditor, until the money was turned over by the bankrupt to the creditor which was within four months prior to the filing of a bankruptcy petition, the amount so paid constituted a voidable preference."

Since the preparation of the brief the attention of counsel has been called to the following case:

In re Mandel, 10 Am. B. R., 774, 778, 779.—"Third. Under the ruling in the case of Mathews *vs.* Hardt, 9 Am. B. R., 373; 79 App. Div., 570, which was decided by the Appellate Division of the Supreme Court, this department, in January, 1903, it was held, construing section 60 of the bankruptcy act, that an agreement by which a firm was to make an advance to a corporation, and should have a lien

for the same upon the property of the corporation, is to be treated as of the date when possession was taken, and not when the agreement for the lien was given. The question to be determined in such a case is, therefore, 'Did the delivery of possession to the defendants and their taking possession within four months of the bankruptcy constitute a preference within the meaning of the bankruptcy act?' As is well stated in the opinion in this case, 'the trend of the decisions in the United States Supreme Court under the recent bankruptcy act upon the subject of the date of transfers is in support of the view that, with respect to an instrument of transfer, it is the time when such instrument is recorded or when possession is taken, or notice is otherwise brought home to the creditors of the bankrupt that is controlling.' In *Crooks vs. Bank*, 3 Am. B. R., 242, decided by the Appellate Division, the court says: 'It is the result or effect of the act done which is declared against, not the manner or method by which it is done. No matter how circuitous the method may be, if the effect of a transfer of property made within four months before the filing of a petition in bankruptcy is to enable any of the bankrupt's creditors to obtain a greater percentage of his debts than others in the class, then such transfer is voidable, if the person receiving it or to be benefited thereby had reasonable cause to believe that it was intended thereby to give a preference.' "

The foregoing is from a report by Stanley W. Dexter, Special Commissioner, approved by Holt, J.

"A chattel mortgage becomes valid as to creditors on the date of the filing or on the date of taking actual possession of the property by the mortgagee."

Wilson vs. Lewis, 63 Neb., 617, 622.

It is respectfully submitted, in the light of these authorities (Brief, pp. 110 *et seq.*), in no event did the contract in this case, even if it be held one of conditional sale, have any validity as against creditors (and hence as against the

trustee in bankruptcy) until it was filed of record; accordingly, the period within which the petition in bankruptcy was required to be filed, in order that thereafter the trustee in bankruptcy might avoid the same, began to run as of the date of the recording and not as of the date of the execution. In other words, the trustee in bankruptcy, having the right to avoid a preferential transfer made within four months prior to the petition and the contract not having been filed until within four months of the petition, the filing constituted a voidable transfer notwithstanding the contract was dated more than four months prior to the petition.

In the course of the discussion it is shown that there is a distinction between mortgages on realty and mortgages on personalty (Brief, pp. 129, 130).

"Without regard to the form, they (the courts) consider the purpose and effect of the transaction.
* * * The obvious effect of these dealings have been the defeat of the purpose of the bankrupt act."

Roberts *vs.* Johnson, 18 A. B. R., 132, 136
(Goff, Brawley, and McDowell, JJ.).

XI.

The case having been disposed of in the court below on the theory—

"In the case at bar, Grant Bros. (bankrupts) never transferred the machinery because it had never been transferred to them" (Brief, p. 35),

it becomes important to consider the exact nature of the interest, if any, of a conditional vendee in the property which is the subject-matter of the conditional sale.

It is respectfully submitted that, where property is sold on condition at a total price of \$5,940 and where payments amounting to \$3,200.14 have been made, the vendee does possess substantial interest of a property nature in the machinery (Brief, pp. 142 *et seq.*). In any event, prior to the recording the property was available for the payment of the

debts of the bankrupt. After the recording, if the recording is to be given any effect or validity, its availability was extinct. Something did happen when the contract was filed for record. That is conceded by the counsel for the appellee (Brief, pp. 14, 15), it being contended that after the filing of the contract for record no

"creditor of the bankrupt could acquire an interest in this property by attachment, seizure upon execution or otherwise, except subject to the claim of the vendee to be paid the balance of the purchase price" (Brief, p. 15).

Here is a clear admission that the seller was only interested in the payment of the unpaid balance of the purchase price; in fact, the decree in the Circuit Court of Appeals directs a return of the machinery to the intervener

"unless the trustee in bankruptcy shall within a time to be named pay the balance due from Grant Bros. to the Baker Ice Company for the purchase price of the machinery" (Rec., p. 35),

thus clearly admitting an interest in the purchaser.

In the brief, authorities are cited giving a definition of "property" (Brief, pp. 142, 143) and of "transfer" as used in the National Bankruptcy Act (Brief, pp. 143, 144). Authorities are cited to the effect that the conditional purchaser does have an interest in the property, and that he may assign this interest, subject always to the interest of the seller (Brief, pp. 144-151).

A number of cases are cited wherein it appeared that a conditional purchaser took out a policy of insurance on property, the policy containing a clause that it (the policy) should be void unless the insured was the owner of the property. This contention of the insurance company has been denied, it being held that the conditional purchaser did have an insurable interest in the property (Brief, pp. 151-162).

A few cases to the contrary are cited (Brief, pp. 162, 163).

The question at issue is also illustrated in this way: Assuming the property, which is the subject-matter of the

contract, is accidentally destroyed, is the vendee excused from paying the balance of the purchase price? The cases which put the liability on the vendee do so on the ground he has an interest in the property (Brief, pp. 163-166).

Quotations are made from

Pomeroy on Equity Jurisprudence (Brief, pp. 166-168)

to the effect that in equity a contract of sale upon condition is treated as creating the seller, the holder of the legal title in trust for the purchaser, the purchaser as the holder of the purchase price in trust for the seller, and the seller as the real owner of the property.

Other authorities are found in the brief, pages 169 *et seq.*

It is believed the following cases will be especially valuable to this court:

Knapp vs. Alexander, 277 U. S., 162, discussing the nature of the interest in realty of an entryman before patent issued.

First National Bank vs. Staake, 202 U. S., 141, discussing the differentiation in section 67 of the bankruptcy law between property in which the bankrupt is possessed of the legal title and property which is to be treated as the property of the bankrupt because of the right which the creditors of the bankrupt have to subject the property in question to their debts (Brief, pp. 174, 175).

There is a recent case—*Geppelt vs. Middle West Stone Co.*, 90 Kansas, 539 (Brief, pp. 176-177)—which is especially important. In that case it is said that under the contract the failure to record an instrument of conditional sale

“suspends the force of the provision in the contract of sale reserving title in the vendor, and it renders the sale absolute so far as innocent purchasers and creditors are concerned, until the contract is placed of record” (Brief, pp. 176, 177).

There is also a discussion of the fact that ordinarily title to property passes by delivery (Brief, p. 178).

It is submitted that what the statutes requiring condi-

tional-sale contracts to be recorded really mean is that unless recorded the title will be held to have passed by delivery unless and until the reservation of title in the contract is made effective by a recording of the contract (Brief, pp. 178, 179).

XII.

In this portion of the brief the question is discussed that the contract, having been executed in October, 1911, and not having been filed until May 15, 1912, the bankrupts having become indebted to other persons between the date of the execution and the date of the recording, these debts take precedence of the instrument; and under the amendment of June 25, 1910, the trustee in bankruptcy being a creditor holding a lien, this right of creditors intermediate the execution and the recording may be asserted by a trustee in bankruptcy for their benefit (Brief, pp. 179 *et seq.*).

In considering this phase of the case it is important to note that General Statutes, 1909, of Kansas, section 5224, makes an unrecorded chattel mortgage

"void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith." (See Original Brief, pp. 10-11.)

The statute of Kansas applying to contracts of conditional sale (Original Brief, p. 24) makes an unrecorded contract

"void as against innocent purchasers or the creditors of the vendee" (General Statutes Kansas, 1909, sec. 5237).

It is well known that the terms "subsequent purchasers and mortgagees in good faith," used in the chattel mortgage statute, and "innocent purchasers," used in the conditional-sale statute, means "purchasers and mortgagees without notice"; so, in considering the Kansas cases, regard must be had to the fact that in *Geiser Mfg. Co. vs. Murray*, 84 Kansas, 450, as to chattel mortgages, and *Paul vs. Lingendelter*,

89 Kansas, 871, as to conditional-sale contracts, the question of notice on the part of creditors was held immaterial. The statute has no qualification with respect to creditors. It does have as to purchasers and mortgagees.

Having regard to the fact that in some of the Kansas cases rights were asserted as against unrecorded mortgages by subsequent mortgagees or purchasers, and that in these cases the question of notice was deemed material, it must be remembered that in the present case we are dealing with the case of a creditor, not a purchaser or mortgagee.

It is pointed out in the brief (p. 180) that as against a person who extends credit intermediate the execution and the recording of the instrument, and the person who delays in recording the same, there is a clear equity in favor of the former. This equity is predicated of an estoppel which prevents the holder of the delayed-in-recording instrument setting up the same against one who extended credit while the instrument was not of record. It is true that the person claiming this equity must predicate it of the fact that he is a creditor, and that this fact must be established by a judgment; but it is *the fact* of the judgment and the issuance of an execution thereon which is controlling, *not the precise date* as of which the same is done (Brief, pp. 180, 181).

The two cases which have been passed on by this court in which the right of intermediate creditors was asserted (*Holt vs. Crucible Steel Company*, 224 U. S., 262, and *Detroit Trust Company vs. Pontiac Bank*, 237 U. S., 186) are cited. In the first case the instrument was never recorded (Brief, p. 181). In the second case, arising under the laws of Michigan, it is clear from an examination of the Michigan authorities (Brief, pp. 182-184) that it is the fact of a creditor holding a lien which is important, not the date as of which the lien was obtained. The Detroit Trust Company case passed off on the proposition that as the trustee in bankruptcy in the then state of the bankruptcy law (prior to June 25, 1910) did not have the right of a creditor holding a lien, there never was in existence a creditor holding a lien.

The brief then takes up the Kansas cases (Brief, pp. 184-189). The precise question at issue in this case arose only in two of the cases: *American Lead Pencil Company vs. Champion*, 57 Kans., 352 (Brief, p. 185), and *Geiser Mfg. Company vs. Murray*, 84 Kans., 450 (Brief, p. 187). The former case is apparently against the contention of the appellant in the case at bar. The latter is clearly a recognition of the truth thereof.

In considering the Kansas cases it will be recalled in that State it is held that taking possession with the consent of the mortgagor is the equivalent of a new mortgage executed as of the date of taking possession. No element of consent by the bankrupt appears in the finding made by the referee in this case; in fact, as disclosed by the record, the property remained in possession of the vendee "until the receiver in bankruptcy took possession of the same on July 13, 1912" (Rec., p. 22).

In the Kansas cases, as has already been pointed out, it is important also to consider the differentiation between a creditor and a subsequent mortgagee or purchaser in good faith. It will also be recalled that prior to *Geiser Mfg. Company vs. Murray*, 84 Kansas, 450, the precise distinction was not accurately noted, and there had been a thought reflected in the Kansas cases prior to that date in which a creditor with notice of an unrecorded instrument was confounded with a purchaser or mortgagee with similar notice.

The brief then calls attention to an Oklahoma case (*In re Johnson*, 212 Fed., 311), construing a statute in the exact words of a Kansas statute, the construction being as contended for by appellant in this case (Brief, p. 189).

It is then contended (Brief, p. 190) that in reality the right of an intermediate creditor is more properly denominated "an equity" (Brief, p. 190). This appears by the authorities cited in the course of the brief (pp. 191-195).

The right asserted on the part of the creditor being an equitable right, the same is enforceable in a Federal court, according to principles of general jurisprudence, the court being at liberty "to adopt the construction we believe to be sound and righteous" (Brief, p. 191).

The cases in the eighth circuit upholding the contention of the appellant with respect to this phase of the case are noted (Brief, pp. 191-195).

Cases in other jurisdictions are cited (Brief, pp. 196, 197). The rule in Missouri is quoted, especial attention being called to *Landis vs. McDonald*, 88 Mo. App., 335, 338 (Brief, pp. 197-201). Other cases in Missouri are quoted (Brief, pp. 201-203).

Then follows a recognition of the doctrine in Mississippi, California, North Dakota, South Dakota, New Jersey, and New York.

Mr. Justice Peckham (as judge): "The mortgage, as to the creditors of the mortgagor was always void. * * * The action is against the mortgagee, and I cannot see the force of the reasoning that while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it, and which assert the validity of such instrument, provided they are taken before the creditors are armed with a judgment and execution so as to enforce their rights which rest upon the invalidity of the mortgage" (Brief, pp. 205, 206).

Mr. Justice Lurton (as judge) concurred in an opinion (Brief, p. 208) to the effect that an unrecorded conditional-sale contract was invalid as to creditors who had thereafter extended credit to the bankrupt notwithstanding that prior to the bankruptcy such creditors had not fastened a lien by legal process upon the property. Such creditors were spoken of as having

"a priority of right to have recourse against this property * * * as against the mortgagee."

In a later case the Circuit Court of Appeals for the Sixth Circuit was constrained to follow what appeared to be the law in the State of Kentucky; but the court expressed its opinion of the construction of the law, which it followed in language that is unmistakable (Brief, p. 208).

As to the State of Kentucky, it appears difficult to ascer-

tain what is really the law of that State (Brief, pp. 207-209).

Other cases are cited, attention being especially called to the rule recognized in New Jersey (Brief, p. 209) and Wisconsin (Brief, p. 210).

XIII.

In this chapter of the brief the attention of the court is called to the fact that as a part of the transaction in which the contract was executed, negotiable promissory notes were given which upon their face import a consideration, but contain no reference to the conditional-sale contract (Rec., pp. 15, 16). In other words, the seller elected to make the obligation of the purchaser absolute by taking negotiable promissory notes in the ordinary form. These notes being negotiable, import an absolute consideration to pay (Brief, pp. 211 *et seq.*).

The only theory on which notes given in connection with a conditional-sale contract can be upheld as importing an absolute promise to pay is that the contract is a reservation of title by way of security—in other words, in effect a chattel mortgage. These authorities are cited as being helpful to the court in determining the exact nature of the instrument in question.

XIV.

In this chapter of the brief the attention of the court is called to the fact that the Circuit Court of Appeals, notwithstanding \$3,200.14 of the purchase price had been paid, ordered the machinery absolutely turned over to the possession of the seller.

In the brief, at page 222, is an error. It is stated:

“Of this price, \$3,214.00 in all was paid.”

The amount should be “\$3,200.14.”

The contract did not call for a forfeiture of the payments made by the purchaser; on the contrary, there was a provision measuring the rights of the parties in the event that

the seller retook possession of the property (Brief, pp. 222, 223).

Authorities are cited showing that in courts of equity, as between a conditional vendor and conditional vendee, the rights of the parties are adjusted in accord with the principles of equity and the terms of the contract (Brief, pp. 222-232).

In other words, under the authorities, the seller having retaken the property, *prima facie*, the purchaser is entitled to a return of that which the seller has been paid under the contract (\$3,200.14); this on the theory that the retaking of the property is in effect an undoing of the contract. Then the purchaser would owe the seller (as provided by the contract) the following amounts:

(a) "All expenses incurred by the party of the first part" (the seller in this contract).

(b) "All damages to the party of the first part arising from the wear and tear of the said machinery, apparatus or plant."

(c) A rental fixed at "six per cent per annum upon the total purchase price herein agreed to be paid, and to be calculated from the date when the machinery, apparatus or plant herein contracted for is erected ready to charge" (Rec., p. 14).

So that, in any event, if the machinery is to be returned to the seller, it should be on the condition that the rights of the purchaser and the seller be determined in accord with the terms of the contract and principles of equity.

XV.

In this chapter of the brief it is pointed out that the Circuit Court of Appeals ordered the machinery to be delivered into the possession of the seller (Rec., p. 35), overlooking the fact that the referee in bankruptcy found that on November 15, 1911, the bankrupts had executed a chattel mortgage on the machinery filed of record November 17, 1911 (Rec., p. 21).

Before the machinery is ordered returned to the seller it is clear the mortgagee should be cited into court and given an opportunity to assert its rights.

BRIEF.**I.**

At the outset, it may be premised, the court is dealing with a question arising under the National Bankruptcy Law, which it has been said is "intended for ready application to every day affairs of business."

Gleason vs. Thaw, 236 U. S., 558, 560.

"It is the purpose of the Bankrupt Act to convert the assets of the bankrupt into cash for distribution among creditors, and then to relieve the honest debtor from the weight of oppressive indebtedness and permit him to start afresh free from the obligations and responsibilities subsequent upon business misfortunes. * * *

"And nothing is better settled than that statutes should be sensibly construed, with a view of effectuating the legislative intent."

Williams vs. United States Fid. & Guar. Co.,
236 U. S., 549, 554, 555.

"Commerce [among the States] is not a technical legal conception, but a practical one, drawn from the course of business."

Swift & Co. vs. United States, 196 U. S., 375, 398; quoted in *Loewe vs. Lawlor*, 208 U. S., 274, 298.

"What is commerce among the States, is a question depending upon broader considerations than the existence of a technically binding contract, or the time and place where the title passed."

Dozier vs. Alabama, 218 U. S., 124, 128.

"We must look to the substance of things, not the names by which they are labelled, particularly in dealing with rights created and conserved by the Federal Constitution and finding their ultimate protection in the decisions of this court."

Crenshaw vs. Arkansas, 227 U. S., 389, 400.

"* * * it was not within the power of the parties by the form of their contract to convert what was exclusively a local business, subject to State control, into an interstate commerce business protected by the commerce clause."

Browning *vs.* Waycross, 233 U. S., 16, 23.

"Although the bargain was not complete until the company's offer was accepted in Virginia, the furnishing of the opportunity was a part of the interstate transaction. *From the point of view of commerce* the business was one affair."

Davis *vs.* Virginia, 236 U. S., 697, 699.

So here we are dealing with a commercial transaction, not with the technical language of a contract. Property was purchased and installed under a contract claimed to be one of reservation of title until payment complete. The contract, dated in October, 1911, was not recorded (though the law required a recording thereof) until May, 1912. Then, when the vendee, to the knowledge of the vendor, was insolvent, the contract was recorded. In the interim credit had been extended, remaining unpaid at the time of the bankruptcy. To enable the vendor in these circumstances to reclaim the property, not from the vendee, but from the creditors of the vendee, would be a gross perversion of business honesty and strike a blow at credit, the very life blood of commerce.

II.

The right of a trustee in bankruptcy predicated of the right of a lien creditor to attack an unrecorded instrument presents a question of local law.

"The legal effect of such a transaction depends upon the local law."

Dale *vs.* Pattison, 234 U. S., 399, 404, citing
Taney *vs.* Penn Bank, 232 U. S., 174, 180
(see cases cited in last-named case, 232
U. S., 180).

Detroit Trust Co. *vs.* Pontiac Bank, 237 U. S.,
186.

III.

The local law applicable is that of Kansas, the place to which the property was shipped by the vendor and installed, and this is true notwithstanding the contract became effective by intervener's approval thereof in Nebraska.

See authorities cited in opinion of referee in bankruptcy, Rec., 19, 20.

Beggs *vs.* Bartels, 73 Conn., 132; 46 Atl., 874; 84 Am. St. Rep., 152.

Potter Mfg. Co. *vs.* Arthur, 220 Fed., 843, 845 (Knappen, Dennison, and Sater, JJ.).

Note to 55 Amer. State Reports, page 48:

"Place of Performance.—Where the parties to a contract reside in different States or countries, unless they take the trouble to both go to the same place, one of them must manifest his assent in one State or country and the other in another. We think it absurd, for the purpose of determining the place of the contract and by what laws it shall be construed and its validity adjudged to inquire which of the parties happened to manifest his assent last, or what was the mode or place of delivery. From the contract, or from it and other competent evidence, the place where it was intended to be executed or enforced can be made evident. The performance of the contract is the essential thing, and, in our judgment, should control, and the place where that performance is to take place should be deemed, for all substantial purposes, the place of the contract. 'Where the contract is either expressly or tacitly to be performed in any other place, there the general rule is in conformity to the presumed intention of the parties that the contract, as to its validity, nature, obligation, and interpretation, is to be governed by the law of the place of performance': Story on Conflict of Laws, sec. 280; Bennett *vs.* Eastern, etc., Ass'n, 177 Pa. St., 233; Liverpool, etc., Co. *vs.* Phoenix Ins. Co., 129 U. S., 397; Coghlan *vs.* South

Carolina, etc., Co., 142 U. S., 101; *Andrews vs. Pond*, 13 Pet., 65. Hence a check drawn in one State, but payable in another, is governed by the laws of the latter: *Abt vs. American, etc., Bank*, 159 Ill., 467; 50 Amer. St. Rep., 175; *Bowen vs. Newell*, 13 N. Y., 200; 64 Amer. Dec., 550. As a general rule, if the contract is by its terms to be performed in a State or country, such State or country is to be deemed the place of the contract, though it may have been delivered, and the last assent or act necessary to its operation may have taken place or been manifested elsewhere: *Orcutt vs. Nelson*, 1 Gray, 536; *Shoe, etc., Bank vs. Wood*, 142 Mass., 563; *Hart vs. Livermore, etc., Co.*, 72 Miss., 809; *Johnson vs. Gawtry*, 83 Ind., 339; *National, etc., Ass'n vs. Ashworth*, 91 Va., 706; *Hefflebower vs. Detrich*, 27 W. Va., 16."

IV.

It is clear that, if prior to the filing for record of the contract in question a creditor had acquired a lien on the property through legal proceedings, then as against that lien, the unrecorded contract, even if held to be one of conditional sale, would have been invalid as a reservation of title.

Paul vs. Lingenfelter, 89 Kansas, 871.

Geppelt vs. Middle West Stone Co., 90 Kansas, 539, 544.

In re Fish Bros. Wagon Co., 164 Fed., 553 (construing Kansas statute, opinion by Hook, J., Sanborn and Philips, JJ., concurring).

V.

Prior to June 25, 1910, a trustee in bankruptcy was not construed to possess the right of a lien creditor.

York Mfg. Co. vs. Cassell, 201 U. S., 344 (see extent to which this case is cited, *Shepard's United States citations*).

Then came the amendment of June 25, 1910, 36 U. S. Stat., 840, which provides:

"SEC. 8. That section forty-seven, clause two, of subdivision *a*, of said bankruptcy act as so amended be, and the same hereby is, amended so as to read as follows:

"Collect and reduce to money the property of the estates for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interest of the parties interested; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon, and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.' "

The amendment of June 25, 1910, to section 47*a*, sub 2, has twice been presented to this court.

Detroit Trust Co. *vs.* Pontiac Bank, 237 U. S., 186.

Holt *vs.* Henley, 232 U. S., 637.

In each of these cases the amendment was held inapplicable, being denied a retroactive effect. So in the case at bar, the court is called upon for the first time to perceive in this amendment the life of an authoritative and definitive purpose emanating from the Congress which enacted it.

VI.

In what spirit shall the amendment of June 25, 1910, be construed?

See authorities as to the spirit of commerce, *ante* chapter I.

The bankrupt act "should be sensibly construed with a view of effectuating the legislative intent" (236 U. S., 555).

"In pursuing this course we do but follow well-approved precedents, and allow the reason of the law to prevail over its letter; 'for the letter killeth, but the spirit maketh alive.' 2 Cor., 3, 6."

Bingham *vs.* Birmingham, 103 Mo. 345,
352 (Sherwood, P. J.).

In *Standard Oil Co. vs. State*, 117 Tenn., 618, the syllabus reads:

"The fundamental rule in the construction of statutes, is that the real intention shall prevail over the literal terms used, for what is within the letter is not within the statute, unless it be within the intention, and what is within the intention is within the statute, though not in the letter; and such construction should be put upon a statute as does not suffer it to be eluded or evaded."

"The occasion of the enactment of a law may always be referred to in interpreting and giving effect to it. The court should place itself in the position of the legislature, ascertain the necessity and probable object of the statute, and then give such construction to the language used as to carry the intention of the legislature into effect, so far as it can be ascertained from the terms of the statute itself."

People vs. Supervisors, 43 N. Y., 130.

"The old law, the mischief and the remedy must be kept in mind" (104 Iowa, 539).

"It is a familiar rule, that a thing may be within the letter of the statute and yet not within the statute because not within its spirit" (143 U. S., 459).

"Another guide to the meaning of a statute is found in the evil which it is designed to remedy; and for this the court properly looks at contemporaneous events, the situation as it existed, and as it was pressed upon the legislative body."

Holy Trinity Church vs. United States, 143
U. S., 456, 463.

"The reason and intention of the lawgiver will control the strict letter of the law, when the latter would lead to palpable injustice, contradiction and absurdity."

1 Kent Com., 462.

VII.

The state of the law with respect to the status of a trustee as a lien creditor prior to June 25, 1910, is reflected in York Mfg. Co. *vs.* Cassell, 201 U. S., 344, and the numerous cases following in its train.

In *Crucible Steel Co. vs. Holt*, 174 Fed., 127, it was held that an unrecorded conditional sale contract was valid as against a trustee in bankruptcy, notwithstanding credit was extended after its execution, such subsequent creditors not having fastened a lien upon the property by legal process prior to the bankruptcy. That case was decided November 16, 1909, affirmed on appeal *sub nom.*

Holt vs. Crucible Steel Co., 224 U. S., 262.

This doctrine was held controlling in *Detroit Trust Co. vs. Pontiac Bank*, 237 U. S., 186.

As to the debates in Congress on the amendment of June 25, 1910, see original brief in this case, pages 13 *et seq.*

As to cases construing section 47a, subdivision 2, as amended June 25, 1910, please note cases in original brief at page 29.

In cases presently noted it was held there must be in existence at the time of the petition in bankruptcy, a creditor who had actually fastened a lien through legal proceedings on the property in the possession of the trustee in bankruptcy.

In re Flatland (Cal.), 196 Fed., 310 (May 20, 1912), opinion by Ross, J., Gilbert and Wolverton, JJ., concurring.

In re Lansman, 183 Fed., 647 (Evans, J.). This last

case was decided December 16, 1910. *Holt vs. Henley*, 232 U. S., 637, was decided March 16, 1914. Under the rule in *Holt vs. Henley*, *In re Lansman*, *supra*, might have been correctly placed on the ground, the contract in that case having been executed prior to the amendment taking effect, the latter did not apply to the case.

In re Sam Z. Lorch Co., 199 Fed., 944, 948, Judge Evans qualified the *Lansman* case.

In re East End Mantel & Tile Co. (Pa.), 202 Fed., 275 (February 5, 1913), opinion by Orr, J., it was said:

"That amendment (June 25, 1910) gives to the trustee in bankruptcy all the rights of a levying creditor; but no creditor had levied upon the property prior to Mr. Robinson's (the mortgagee's) possession, and therefore the receiver in bankruptcy did not succeed to any right of any known creditor. Nor does the court see, in the absence of any prior proceeding by a known creditor, how the rights of a trustee in bankruptcy can exist prior to the time of his appointment" (202 Fed., 278, 279).

The cases cited (*In re Flatland*, *In re East End Mantel & Tile Co.*, and *In re Lansman*) are the only cases laying down the doctrine stated (215 Fed., 705) and are overwhelmed by a mass of authority to the contrary. See collection of cases, 215 Fed., 705.

In re Flatland, *supra*, does not cite the amendment of June 25, 1910, nor does it appear from the report that the chattel mortgage in question was executed after June 25, 1910. The same court has ruled directly to the contrary of *In re Flatland*.

In *Pacific State Bank vs. Coats* (Wash.), 205 Fed., 618 (May 21, 1913), opinion by Wolverton, J., Gilbert and Morrow, JJ., concurring, it is said of the amendment of June 25, 1910:

"It is the purpose of this amendment to vest in the trustee for the interest of all creditors the potential rights of creditors possessing or holding liens

upon the property coming into his custody by legal or equitable proceedings. * * * The amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings. 'The class of cases, unprovided for by the original act, and intended to be reached by this amendment,' says Mr. Collier in his work on Bankruptcy (9th ed.), p. 659, 'was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens.' * * * Mr. Collier is further of the view that: 'The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the varying registration laws of each of the States.' Collier on Bankruptcy (9th ed.), p. 660" (205 Fed., 622).

In *Meier & Frank Co. vs. Sabin* (Wash.), 214 Fed., 231 (May 25, 1914), opinion by Morrow, J., Gilbert and Ross, JJ., concurring, it was said of the amendment of June 25, 1910:

"Under this provision of the statute the trustee
* * * may make any objection that a creditor
holding a lien might make" (214 Fed., 233).

In the case cited no creditor had acquired a lien prior to bankruptcy.

In re O'Brien (N. J.), 215 Fed., 129 (June 3, 1914), opinion by Haight, J., an unrecorded conditional sale contract was held invalid as against a trustee in bankruptcy.

In re Merry (Me.), 201 Fed., 369 (January 4, 1913), opinion by Hale, J., it was said by the amendment of June 25, 1910, "trustees in bankruptcy shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon" (201 Fed., 371). Accordingly, an unrecorded title reten-

tion note was held invalid as against a trustee in bankruptcy.

In re Nuckols (Tenn.), 201 Fed., 437 (March 16, 1912), opinion by Sanford, J., a chattel mortgage which had not been registered as required by the statutes of Tennessee, hence invalid as against a judgment creditor holding an execution returned unsatisfied, was held invalid as against a trustee in bankruptcy, applying the amendment of June 25, 1910.

In Townsend vs. Ashepoo Fertilizer Co. (S. C.), 212 Fed., 97 (February 6, 1914), opinion by Woods, J., Pritchard and Rose, JJ., concurring, it was held that an unrecorded contract of conditional sale was void as against a trustee in bankruptcy.

In re Pittsburg-Big Muddy Coal Co. (Ill.), 215 Fed., 703 (May 11, 1914), opinion by Baker, J., Seaman and Mack, JJ., concurring, it was held that under the laws of Illinois, a mortgage, by reason of a failure to file for record certain affidavits,

“though remaining valid between mortgagor and mortgagee, became subject to avoidance by lien creditors. But there were no creditors with liens when bankruptcy intervened. * * *

“Appellant’s contention that the trustee under the amendment of 1910, cannot defend against a voidable chattel mortgage unless *there be in fact* ‘a creditor holding a lien’ on the chattels, is supported by the cases of *In re Lansman* (D. C. W. D. Kentucky), 183 Fed., 647, and *In re Flatland* (C. C. A., 9th Cir.), 196 Fed., 310; 116 C. C. A., 130.

“But we hold that under the amendment the filing of a petition constitutes an equitable levy and a caveat to the world, for the following reasons: (1) The plain and natural reading of the words gives the trustee the same right to attack or resist secret liens that judgment creditors would have had if bankruptcy had not intervened, no matter whether there are or are not any such creditors when the petition in bankruptcy is filed. (2) If the amend-

ment were to be construed so as to limit the power of the trustee to cases in which there are lien creditors, virtually nothing would be added to the original act, for under sections 67*c* and 67*f* liens created within four months prior to the filing of the petition may be used by the trustee for the benefit of the estate."

Reference is made to the history of the amendment, and there is an exhaustive collection of the authorities interpreting the amendment of June 25, 1910 (215 Fed., 705).

In *Augusta Grocery Co. vs. Southern Moline Plow Co.* (S. C.), 213 Fed., 786 (February 5, 1914), opinion by Pritchard, J., Knapp and Woods, JJ., concurring, it was held an unrecorded contract of conditional sale was invalid as against a trustee in bankruptcy.

In re Riehl (Md.), 200 Fed., 455 (November 12, 1912), opinion by Rose, J., it is held, speaking of the amendment of June 25, 1910:

"The trustee, as representing the general creditors, is given all the rights and priorities which by the State law would be accorded to a creditor holding a lien by legal or equitable proceedings on the property, the proceeds of which are to be distributed" (200 Fed., 457).

In re A. Gaglione & Son (Pa.), 200 Fed., 81 (October 11, 1912), opinion by Witmer, J., it was held:

"Since the amendment of section 47*a* (2) by act June 25, 1910, the trustee is placed upon the footing of a creditor with a legal or equitable lien and may take full advantage of such rights" (200 Fed., 84).

In re Geiver (S. D.), 193 Fed., 128 (February 3, 1912), opinion by Elliott, J., it was said of chattel mortgages given more than four months prior to the filing of the petition in bankruptcy:

"This property having come into the custody of the court, and being claimed by the * * * (mort-

gagee) the trustee is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. * * * He is now in the position of a creditor holding a legal or equitable lien, and in the case at bar the chattel mortgages are to be interpreted exactly as if the trustee was a creditor holding such lien" (193 Fed., 137).

In re Nelson (S. D.), 191 Fed., 233 (August 8, 1911), opinion by Elliott, J., an unrecorded conditional sale contract was held invalid as against a trustee in bankruptcy. The court said of the amendment of June 25, 1910:

"If property coming into the custody of the court be claimed by another, the trustee is vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon. * * * He is now in the position of a creditor holding a legal or equitable lien."

In Sturdivant Bank vs. Schade (Mo.), 195 Fed., 188 (February 27, 1912), opinion by Carland, J., Sanborn, J., concurring, it is said:

"The trustee, being in possession of the real estate upon which the lien is claimed, by virtue of section 47a of the bankruptcy act must be deemed a creditor holding a lien thereon by legal or equitable proceedings" (195 Fed., 197).

In re Farmers Supply Co. (Ga.), 196 Fed., 990 (May 13, 1912), opinion by Newman, J., it is said:

"There is no doubt that prior to the amendment of bankruptcy act June 25, 1910, a conditional sale, although unrecorded as required by the statutes of Georgia * * * was good against general creditors and as against the trustee in bankruptcy. * * * This amendment made a vital change in the act. * * * (the trustee) had when the present bankruptcy proceeding was instituted, 'the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings'" (196 Fed., 992); *In re Lansman*, 183 Fed., 647, was disapproved.

In re J. S. Appel Suit & Cloak Co. (Colo.), 198 Fed., 322, 327 (August 1, 1912), opinion by Lewis, J., it was said:

"It is unnecessary to determine whether the contract in the clause quoted operated as an absolute sale with the reservation of a secret lien or whether its effect was a conditional sale of the tube system. In either event it would be constructively fraudulent and void as against creditors who had acquired a lien without notice of the rights of the vendor. * * * The trustee is by the amendment to the bankruptcy act clothed with the rights of such creditors."

In re Daney Hardw. & Furn. Co. (Ala.), 198 Fed., 336 (August 14, 1912), opinion by Grubb, J., it was said:

"One of the purposes of the amendment (of June 25, 1910), was to confer on trustees in bankruptcy the same right to avoid secret unrecorded liens as the creditors would have had under the State laws, had not the bankruptcy intervened and the exercise of which they are deprived by the bankruptcy proceeding. * * *

"The trustee by the express language of the bankruptcy act has the potential rights in this respect of a creditor holding a lien by legal proceedings. It is not necessary to his right that there should in fact have been such lien creditors when the petition was filed" (198 Fed., 339).

In re Smith (Wis.), 198 Fed., 876 (September 23, 1912), opinion by Geiger, J., a mortgage executed March 17, 1908, was not filed until September 8, 1909. "Under the law, such filing was effective for two years; but unless within thirty days before the expiration of such two years a renewal affidavit was filed, it ceased to be valid." A renewal affidavit was filed March 7, 1910. It was held the mortgage ceased to be valid against *creditors* on September 8, 1911, and hence invalid as against the trustee in bankruptcy under the amendment of June 25, 1910.

In re Whatley Bros. (Ga.), 199 Fed., 326 (August 21,

1912), opinion by Newman, J., it is held of the amendment of June 25, 1910:

"While the courts are not in entire accord, I think it may be considered as settled now that the purpose of the act of June, 1910, was to give the trustee in bankruptcy a lien for the benefit of creditors generally, such as a creditor would have 'by legal or equitable proceedings. Such is the plain language of the amendment, and there is no escape, so far as I can see, from the conclusion that this was the intent of Congress in its enactment. It is recognized of course, that the main purpose of the amendatory act of June 25, 1910, was to relieve general creditors from the situation which had been created by many decisions * * * Congress gave to trustees in bankruptcy this lien which operates generally and attaches to all property coming into the custody of the bankrupt court' " (199 Fed., 328). *In re Flatland*, 196 Fed., 310, was disapproved.

In re Kreuger (Ky.), 199 Fed., 367 (March, 1912), opinion by Cochran, J., it was said of a trustee in bankruptcy, under the amendment of June 25, 1910:

"Had bankruptcy not ensued, a creditor holding a lien by legal or equitable proceedings on the wagons in question would be entitled to prior claim over the unrecorded lien of the petitioner, and by the express terms of the amendment the trustee herein is vested with the same right."

In Cattler vs. Slonimsky (Pa.), 199 Fed., 592 (October 14, 1912), opinion by Thompson, J., a trustee in bankruptcy, under the amendment of June 25, 1910, was accorded the right of a judgment creditor to maintain an action of trespass on the case for conspiracy prior to bankruptcy to fraudulently secrete and transfer the debtor's property.

In re Groezinger (Pa.), 199 Fed., 935 (October 30, 1912), opinion by Witmer, J., a transaction was found to be "in-

valid as against execution creditors of the bankrupt, and so is invalid against his trustee in this proceeding, to which the amendment of the 25th day of June, 1910, applies."

In re Hartdagen (Pa.), 189 Fed., 546 (July 29, 1911), opinion by Witmer, J., a contract construed to be one of conditional sale and under the law of Pennsylvania void as to creditors of the purchaser, was under the amendment of June 25, 1910, held invalid as against a trustee in bankruptcy. The court said, the amendment "puts the trustee, in so far as the assets of the estate are concerned, in the position of a lien creditor."

In re Franklin Lumber Co. (Pa.), 187 Fed., 281 (May 6, 1911), a contract construed as one of conditional sale and unrecorded, was held invalid as against a trustee in bankruptcy. The amendment of June 25, 1910, was held applicable and of the trustee, it was held:

"Since that date (June 25, 1910), he has been put upon the footing of a creditor with a legal or an equitable lien."

In re Gehris-Herbine Co. (Pa.), 188 Fed., 502 (June 1, 1911), opinion by J. B. McPherson, J., a contract unrecorded construed as one of conditional sale was held invalid, under the amendment of June 25, 1910, as against a trustee in bankruptcy.

"Decisions holding that a trustee has no other right than belonged to the bankrupt are no longer controlling" (p. 503).

In re Hammond (Ohio), 188 Fed., 1020 (March 15, 1911), opinion by Killits, J., a mortgage executed September 21, 1909, and not recorded, petition in bankruptcy filed September 17, 1910, was held void as against a trustee in bankruptcy.

"At any time * * * after the adoption of the amendment, any creditor, by reducing his claim to judgment and levying, or by suing out an attach-

ment, could have defeated Fee's mortgage. At all times he was in peril of the individual actions of Hammond's creditors in this way. The amendment of June 25, 1910, does nothing more under these circumstances than to collectively put these creditors into the position of judgment or attaching creditors by representation."

In re Bazemore (Ala.), 189 Fed., 236 (May 12, 1911), opinion by Grubb, J., an unrecorded conditional sale contract was held invalid, as against a trustee in bankruptcy, applying the amendment of June 25, 1910.

"Before the amendment to the bankruptcy act, the trustee's title as against a claim under an unrecorded conditional sale, though the State law required record, did not prevail * * * *It was to obviate this*" that the amendment under discussion was adopted (189 Fed., 237).

"If the operation of the amendment is restricted to cases in which a creditor has in fact acquired a lien by legal or equitable proceedings, then it adds nothing to the law as it was under the original act. * * * The class of cases, unprovided for by the original act and intended to be reached by the amendment were those in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors of that class."

In re Lansman, 183 Fed., 647, was disapproved. - See also opinion of Judge Grubb, *In re Calhoun Supply Co.*, 189 Fed., 537.

"The amendment of 1910, by placing the trustee in the possession of an execution creditor with a levy on the property in his custody * * * gives him more than the rights which any creditor may have chanced already to have asserted. It gives him in addition thereto all rights which would have been obtainable by creditors under State law had the trustee been an officer holding an execution or equitable process in behalf of all creditors. This right

is not a right derived from existing creditors * * *
It is a right derived from the statute itself."

2 Remington on Bankruptcy (2d ed.), sec.
1138, p. 944.

The trustee in bankruptcy "as to the property in the custody * * * of the bankruptcy court, takes it in such plight and condition only to the extent *some creditor would have taken it had such creditor held a lien* by legal or equitable proceedings thereon."

2 Remington on Bankruptcy (2d ed.), pp. 960, 961,
sec. 1143.

The trustee's title "now includes also whatever rights creditors under State law would have had had they been 'armed with process,' whether actually so 'armed' or not."

2 Remington on Bankruptcy (2d ed.), p. 1022, sec.
1207.

"The trustee is * * * to be deemed a creditor under State law 'armed with process,' whether or not, in fact there be such a creditor actually in existence."

Ib., p. 1023, sec. 1207.

The trustee's rights under the amendment of June 25, 1910, "effectually invest the trustee, as representative of the creditors, with all the possible rights of creditors under State law. He is in effect erected by the statute into an ideal 'creditor'—one might say into all kinds of a creditor, having all rights possible to a creditor under State law."

2 Remington on Bankruptcy (2 ed.), p. 1105, sec.
1270.

"An unrecorded or unfiled (as the case may be) conditional sale contract is likewise void as against the trustee, in States where recording or filing is required to preserve the vendor's rights as against creditors."

2 Remington on Bankruptcy (2 ed.), p.
1081, sec. 1241.

"To hold that the rights of a trustee as a creditor 'armed with process' do not arise until adjudication, would largely defeat the object of the amendment of 1910, and would afford a convenient method of perpetuating the evils sought to be remedied, by affording opportunity for recording after the non-recording had accomplished the harm meant to be guarded against by the registration acts of the various States."

2 Remington on Bankruptcy (2 ed.), p. 1123, sec. 1270.

In re Palmer, 218 Fed., 74 (Ray, J.), a note in the form of a chattel mortgage, dated August 25, 1913, was not filed for record until April 24, 1914, about one month before the bankruptcy—held void as against the trustee in bankruptcy.

"Such a mortgage must be filed within a reasonable time, which means as soon as would be demanded in the exercise of reasonable diligence."

In re Pacific Elec. & Auto. Co., 224 Fed., 220, the syllabus reads:

* * * * *

"2. Bankruptcy—Title of Trustee—Conditional Sale Contracts.—Under Bankr. Act (act July 1, 1898, c. 541, 30 Stat., 557), §47, subd. A, cl. 2, as amended by act June 25, 1910, c. 412, §8, 36 Stat., 840 (Comp. St., 1913, §9631), * * * an adjudication in bankruptcy creates a lien in favor of the trustee on all property in the custody, or coming into the custody, of the court, and the status of general creditors is changed, and by operation of law, a lien is created in favor of the trustee for them, and the rights of the trustee supersede any rights, previously existing under a conditional sale of the bankrupt, a memorandum of which was not recorded, as required by State statute to be valid as to * * * creditors" (Neterer, J.).

The amendment of June 25, 1910, "gives the trustee (in bankruptcy) a superior position with reference to some kinds of transactions (notably conditional sales), which would have been valid as against the bankrupt himself, though voidable as to lien creditors. And so far it must be considered as modifying the general rule" prevailing prior to the adoption of the amendment.

Black on Bankruptcy, sec. 316, p. 753.

"Prior to the amendment of 1910, the trustee took no better right or title to the bankrupt's property than belonged to the bankrupt or to his general creditors at the time the trustee's title accrued" (citing a host of authorities). * * *

"The rule thus established * * * permitted creditors having an unrecorded * * * conditional sale contract * * * valid against the bankrupt, and (as against) creditors who had not actually seized such property under legal process, to enforce such liens. The object of the amendment of 1910 was to avoid the effect of this rule. * * *

"The trustee may be said to now stand in the shoes of the bankrupt, clothed with the rights, remedies, and powers of a lien creditor and a judgment creditor instead of a general creditor as before the amendment. He may now challenge any security or conveyance that a lien creditor or a judgment creditor might challenge had bankruptcy not intervened."

1 Loveland on Bankruptcy (4th ed.), sec. 372, pp. 765, 767, 768.

"Prior to the amendment of 1910, the trustee was not clothed with the privileges of a judgment creditor. The trustee's title as against a claim under an unrecorded conditional sale, though the State law required record, did not prevail. It was to obviate this, among other things, that section 47, clause 2, subsection A, of the act was amended" (as hereinbefore quoted).

"A further object was to vest in the trustee the same right to attack secret unrecorded liens, where record was required by the State law, as was given

to the judgment creditors and others under that law. The class of cases, unprovided for by the original act and intended to be reached by the amendment, was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens. The language is readily susceptible of this construction.

* * * (it) aptly refers to such rights, remedies, and powers as a creditor holding such lien is entitled to under the law, rather than to the rights, remedies, and powers of a creditor who had actually fastened a lien on the property of the bankrupt estate. * * * The words 'creditor holding a lien by legal or equitable proceedings' include a judgment creditor holding an execution lien. The purpose of Congress was to embrace within these words every class of creditors with liens by legal or equitable proceedings favored by the registration laws of each of the States. * * * The breadth of language was used for the purpose of gathering in all classes protected by all local registration acts. * * * His rights in respect to the property against which the lien is asserted *flow from the amendment* and not from the creditors of the estate, for whose benefit such rights must be exercised * * * Decisions holding that a trustee has no other rights than belonged to the bankrupt are no longer controlling."

Collier on Bankruptcy (10th Ed., by Gilbert), pp. 659-662b.

"The cause * * * must be decided under the provisions of the bankrupt act as it existed in February, 1903—*before the material changes created by amendments.*"

Detroit Trust Co. vs. Pontiac Bank, 237 U. S., 186, 187.

In *Krayer vs. Abrahams* (Pa.), 29 Am. B. R., 365, Judge Thompson disposed of a demurrer to a plaintiff's statement of claim in an action to recover a sum of money claimed to have been paid in circumstances entitling the trustee to avoid the payment either as preferential or fraudulent in its nature.

"The defendant demurs upon the ground that the statement contains no averment that the trustee, the plaintiff, has not sufficient assets on hand to pay all of the bankrupt's creditors in full, relying upon the cases of * * *. The rule laid down in the cases cited was based upon the ground that the trustee has no rights superior to the creditors whom he represents and that even if the transfer is fraudulent, there is no right to avoid it unless it appears that the assets of the bankrupt estate are insufficient to pay the creditors in full. The necessity, if it existed, to aver and prove a deficiency of assets appears, however, to have been removed by the amendment of 1910 * * * under the amendment where a transfer is alleged to have been fraudulent as to creditors and insolvency is alleged to have existed at the time, the trustee is in the position of a creditor who has proved by an execution returned unsatisfied, that a deficiency no longer exists.

"A receiver appointed in a suit in equity instituted by a creditor against his solvent debtor, to administer, convert into money the property of the debtor, and distribute the proceeds thereof among his creditors, has the power of creditors armed with process to disregard or avoid, under section 2889, Revised Statutes of Missouri, 1909, the unrecorded condition of a contract of conditional sale to the debtor of personal property which the receiver finds in his possession and seizes there, even though no creditor had sued out any process before the seizure. *In re Wilcox & Howe Co.*, 70 Conn., 220, 39 Atl., 163, 166; *Duplex Printing Press Co. vs. Clipper Publishing Co.*, 213 Pa., 207, 62 Atl., 841, 842, 843; *H. K. Porter Co. vs. Boyd*, 171 Fed., 305, 313, 96 C. C. A., 197."

T. L. Smith Co. vs. Orr, 224 Fed., 71, 74 (Sanborn & Smith, JJ.).

The report of the Senate Committee on Judiciary with respect to the amendment of June 25, 1910, is set out in our original brief (pp. 13 *et seq.*).

"The petitioners in this case claim that the trustee takes this property subject to the lien of the deed of trust by reason of the fact that said security was mentioned in the voluntary petition of bankruptcy, and therefore, although the deed of trust was not recorded as required by the statute of Texas, the trustee takes it with notice of the lien, and therefore subject to it.

"To decide this question it is necessary to consider in what capacity the trustee in bankruptcy takes the property. Does he take it as an ordinary voluntary purchaser, or does he take it as representing the rights of the creditors with a lien acquired by legal or equitable means, and subject only to such liens and rights as would be valid against such creditors? The provision of the amendment of 1910, read in connection with section 67*a*, would seem to settle this question against the contention of the petitioners in this case. The case of *Pacific State Bank vs. Coats*, reported in 205 Fed., at page 618, 123 C. C. A., 634; Ann. Cas., 1913 E., 846, is a case decided by the Circuit Court of Appeals for the Ninth Circuit, subsequent to the passage of the amendment 1910 to section 47*a*, cl. 2, and this pertinent language on page 622 of 205 Fed., page 638 of 123 C. C. A. (Ann. Cas., 1913 E., 846), in said report is used:

"The trustee no longer stands in the shoes merely of the bankrupt, with the limited rights of the bankrupt to attack unrecorded liens which may be valid and unimpeachable by such bankrupt; but the amendment by operation of law vests in him a lien equivalent to such as would be acquired by legal or equitable proceedings upon the property coming into his custody by virtue of the bankruptcy proceedings. 'The class of cases unprovided for by the original act, and intended to be reached by the amendment,' says Mr. Collier in his work on bankruptcy (9th ed., page 659), 'was that in which no creditors had acquired liens by legal or equitable proceedings and to vest in the trustee for the interest of all creditors the potential rights of creditors potential with such liens.' 'This provision of the bankruptcy act,' says Witmer, Judge, *In re Hartdagen* (D. C.), 189 Fed.,

546, 'puts the trustee, in so far as the assets of the estate is concerned, in the position of a lien creditor.'

"It would seem plain from the words of the act as amended, and the construction given the same since the amendment, that it places the trustee in a far different position from that of the voluntary purchaser. The words of the Texas statute are explicit that unless such liens are recorded they shall be invalid as against claims of creditors. The provision in the bankruptcy act, that the trustee shall take the property with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereunder, would seem to leave no doubt of the proper position of the trustee in bankruptcy in cases of this kind. He represents the creditors, and is vested with all the rights of such creditors as if a lien had been acquired upon the property by legal or equitable means without notice of the unrecorded deed of trust. There could be no question in this case, if one or more of the creditors of McKinney & Erskine had acquired an attachment lien on the 9th of January (1913, the date of the filing of the petition in bankruptcy, page 43), against the property of the bankrupt without notice of said deed of trust, that this unrecorded deed of trust, of which no notice was had, that said deed of trust could not have been asserted as a lien to defeat the lien of the attaching creditor. This being so, under the bankruptcy act the trustee takes the property as though such lien had been acquired by the creditor, and takes it free of the deed of trust."

Cooper Grocery Co. *vs.* Park, 218 Fed., 42, 43
(Pardee, Walker, and Call, JJ.).

An unrecorded contract of conditional sale, held invalid in New Jersey as against a trustee in bankruptcy.

In re Vandewater & Co. (1915), 219 Fed., 627
(Haight, J.).

But as of what date do the rights of the trustee attach? The solution of this question is important in the case at bar, because the contract dated in October, 1911, was filed

for record in May, 1912, and the petition in bankruptcy was filed in July, 1912. It has already been pointed out, if a creditor had levied on the property in controversy prior to the recording, or if the contract had not been filed for record prior to the petition, then the trustee in bankruptcy in his capacity as a lien creditor as fixed by the amendment of June 25, 1910, would hold the property for the estate. But do the rights of the trustee as a lien creditor antedate the filing of the petition? The authorities all agree the amendment had for its objective point, the elimination of the doctrine of *York Mfg. Co. vs. Cassell*. But *Detroit Trust Co. vs. Pontiac Bank*, 237 U. S., 186, is based on *York Mfg. Co. vs. Cassell* (237 U. S., 188). In the last case (237 U. S., 186) a mortgage executed in May, 1902, was not recorded until September, 1902. The bankruptcy was instituted after January, 1903. Held, that, inasmuch as prior to the recording, no lien on the property had been acquired by a creditor through legal process, the creditor could not impugn the mortgage for the delay attendant upon its recording.

But shall *York Mfg. Co. vs. Cassell* be held to have been displaced by the statute, and its progeny, *Detroit Trust Co. vs. Pontiac Bank*, still survive? Shall the trunk be held to have been cut down, and the branch still be considered as existent and extended, rather than prostrate? In the cases hereinbefore cited, no differentiation is made as to the time when the rights of the trustee as a lien creditor attach. The most general language is used—the trustee is spoken of as any kind of a lien creditor through legal process, the “most favored creditor,” which expressions clearly include a creditor who obtained a lien prior to the recording.

On this question, a Pennsylvania case is directly in point.

“When a vendee, or a pledgee, takes title to personal property, without taking possession of it, he takes the risk of the integrity and solvency of his vendor, or pledgor, when the rights of subsequent bona fide purchasers, or of levying creditors, arise

White *vs.* Gunn, 205 Pa., 229. Appellant does not deny the rule, but insists that it should not be applied to the facts of the present case. It is contended that the rule does not apply because a few days before the motor car company was adjudged a bankrupt, appellant took possession of the cars in dispute, which under its contract it had the right to do, even without seizure or writ of replevin, and that having possession when the bankrupt proceedings were instituted, no matter by what process obtained, the case at bar is distinguished from Clow *vs.* Wood, and all the cases that have followed it. Such a distinction can be made, and the argument in support of it has merit, but we are not prepared to say, and for the purposes of the case at bar it is not necessary to finally say, that such a distinction should be made. Primarily, this is a controversy between the trustees in bankruptcy, representing the creditors of the bankrupt estate, and the bank claiming title to the automobiles as pledgee. The rights of creditors, the question of preferential liens, and the rules of procedure, under the bankruptcy laws, must necessarily prevail. The bankruptcy act of 1898 provides, *inter alia*, 'that all levies judgments, attachments or other liens obtained through legal proceedings against a person who is insolvent, at any time within four months prior to the filing of a petition in bankruptcy against him, shall be deemed null and void in case he is adjudged a bankrupt * * *.' The act contains many other provisions relating to liens created and transfers of property made for the purpose of giving a preference after insolvency has become known and within the four months' period. For the purposes of the present case, we do not deem it necessary to discuss or determine whether what was done by the parties constitutes a preferential transfer of property within the meaning of the act. This is primarily a question for the Federal courts, and, as we do not deem it vital in the determination of the rights of the parties here involved, it may be passed without further discussion. It may also be conceded that in the present case there was no levy, or judgment, or attachment or other lien obtained through legal proceedings against the bankrupt within four months

prior to the filing of the petition in bankruptcy. It is doubtful to say the least whether taking possession of the motor cars by means of a writ of replevin constitutes the obtaining of a lien upon which the act has placed the seal of its disapproval. But the courts have uniformly taken the view that these provisions of the act were intended to prevent preferences and secure equality in the distribution of bankruptcy estates. This has been the underlying thought of all the courts called upon to interpret the bankruptcy act of 1898, and we think it has an important bearing upon the effect to be given the amendment of 1910. This amendment added to section 47 of the original act the following clause: 'And such trustees as to all property in the custody, or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon: and also as to all property not in the custody of the bankruptcy court shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.' The manifested purpose of the amendment was to enlarge the rights, remedies, and powers of a trustee in bankruptcy, and it had the effect of vesting in the trustee the rights, remedies, and powers of a judgment or other creditor having a lien at the time of instituting bankruptcy proceedings.

"In other words, the trustee was given the power to assert every right which such creditors could have asserted during the period of four months immediately preceding the filing of the petition in bankruptcy. If a judgment creditor had issued an execution and levied upon the automobiles while they were in the possession of the motor car company, his rights would have been superior to those of the pledgee, and they could have been sold as the property of the pledgor in satisfaction of the debt of the levying creditor. As to the motor cars in dispute here, the rights of the parties must be determined as they existed during the entire four months' period. If appellant had obtained a judgment on the notes held by it and had issued execu-

tion thereon within that period, all proceedings thereunder would have been deemed null and void when the insolvent company was adjudged a bankrupt. It is difficult to see how upon any equitable or legal grounds, it should occupy a more advantageous position because it caused a writ of replevin to be issued a few days before the petition in bankruptcy was filed, and, after it must have known of the insolvency of its debtor. When the insolvency became known, each creditor did what he could to protect his own interests, and no blame can attach to anyone for so doing, but as we view it, appellant did not act soon enough to take the property of the bankrupt out of the grasp of general creditors. The purpose of the original bankruptcy act, as well as the amendment in 1910, was to enforce equality of distribution among all the creditors, to strike down secret liens, and to avoid preferential transfers of property, and as we read the decisions of the Federal courts the conclusion is irresistible that they so understand and construe the law. The general purpose of the acts would be defeated if the contention of appellant should be sustained in the present case. While the rights of appellant could be asserted under its original contract against the motor car company, they cannot prevail against the general creditors of the bankrupt under the circumstances of this case. * * * Mr. Chief Justice Fell and Mr. Justice Brown, dissent."

Bank of North America *vs.* Penn Motor Car Co., 235 Pa. St., 194, 198.

"The plaintiff in error, as we have seen, was holding the property in question under a mortgage that was void as to creditors under the provisions of the Oklahoma statute. His taking possession of the property under the mortgage gave him no right as against the creditors, in view of the fact that bankruptcy pro-

ceedings were commenced in less than four months' time after he took possession."

Cornelius *vs.* Boling, 18 Okl., 469, 477.

The case is open to the criticism that it is in conflict, so far as the status of the trustee as a lien creditor is concerned, with York Manufacturing Company *vs.* Cassell. That is to say, prior to June 25, 1910, the Supreme Court of Oklahoma accorded a trustee in bankruptcy the status of a lien creditor. But since the amendment of June 25, 1910, does accomplish that result, this distinction is not now important. On the fundamental proposition at issue in this case the authority is in favor of the contention of appellant.

Section 60*b* (prior to 1910 as amended in 1903) :

"If a bankrupt shall have given a preference, and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee." * * * (32 U. S. Stat. at Large, p. 800).

Section 60*b* as amended June 25, 1910:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or *have made a transfer of any of his property, and if at the time of the transfer, or of the entry of the judgment, or of the recording or registry of the transfer, if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be insolvent, and the judgment or transfer then operate*

as a *preference*, and the person receiving it or to be benefited thereby, or his agent acting therein shall *then* have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee. * * * (36 U. S. Stat. at Large, p. 842).

As to date, the decision in *Williams vs. German-American Trust Co.*, 219 Fed., 507 (Carland, T. C. Munger, and Youmans, JJ.), is directly in point. That was a suit by a trustee to recover a voidable preference. A mortgage of record had become void for want of a renewal affidavit. Possession was taken by the mortgagee April 25, 1913, under circumstances of a preferential nature. Petition in bankruptcy filed May 20, 1913. Held, the bill stated a cause of action.

In re East End Mantel & Tile Co., 202 Fed., 275, 279; *Bank of North America vs. Penn Motor Car Co.*, was cited, but Judge Orr sought to distinguish it on the ground that "legal proceedings were necessary to acquire possession, and because the trustee of the bankrupt, before the completion of such proceedings intervened." Judge Orr also ruled "that the bankruptcy law does not intend that the trustee shall be vested with any greater right to subject the property of third persons to the payment of the bankrupt's debts than any creditor had at or before the time that such trustee was appointed." This doctrine is overwhelmingly opposed by the current of authority.

Attention will now be called to some cases in which the date as of which the rights of trustee as a lien creditor attach is held to be the date of the petition.

2. "It is the accepted construction of this statute in Ohio that such an unrecorded contract is not valid as against creditors generally, but only as against those who, for themselves or by representation, fasten a lien upon the property in aid of their claims. See *York vs. Cassell*, 201 U. S., 344; 26 Sup. Ct., 481, 50 L. Ed., 782."

* * * * *

3. "Under the rule of *York vs. Cassell*, *supra*, this superior right did not pass to the trustee in bankruptcy, but he stood in the shoes of the bankrupt. This rule has been changed by the amendment of June 25, 1910, to section 47a (2), providing that as to property 'in custody' the trustee 'shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings'; and, of course, the nature and extent of these 'rights, remedies, and powers' must be determined by the law of the State, where not inconsistent with the bankruptcy act. There is general agreement that the amendment of 1910 was made with the very purpose of changing the rule declared in *York vs. Cassell* (*Remington*, vol. 3, §§ 1137 and 1212½; *Loveland* [4th ed.], vol. 1, p. 767); and we think it is clear that such was the effect, and that the trustee stands in the place of each creditor, and may assert the rights which any creditor would have

had against the property 'in custody,' if that creditor, at the date of filing the petition in bankruptcy had been holding an execution levy. See *Massachusetts Co. vs. Kemper*, 220 Fed., 847; — C. C. A., — (opinion filed today). It cannot be said that the intent of the amendment was only to put the trustee in the position of the creditor who had, in fact, obtained a lien, because that was the law before the amendment. See section 67*f*, and *In re Martin*, *supra*; *Foerstner vs. Citizens' Co.*, *supra*, and *In re Rouse*, 208 Fed., 881, 126 C. C. A., 90."

Potter Mfg. Co. vs. Arthur, 220 Fed., 843, 846, 847.

"In *Title Guaranty Co. vs. Witmire*, 195 Fed., 41, 43, 115 C. C. A., 43, we held that an instrument substantially like the present application contract was, in real effect, a chattel mortgage, and was governed by chattel mortgage recording statutes. It results that under the Ohio statute the purported assignment of the title or creation of the lien on this machinery was valid as against creditors; and, under the amendment of July 25, 1910, to section 47*a* (2), as interpreted by us in the opinion this day filed in *Potter Mfg. Co. vs. Arthur*, 220 Fed., 843, — C. C. A., —, it was invalid as against a trustee in bankruptcy. This statute does not suggest whether it intends to speak only of subsequent creditors."

"As above recited, after filing the petition in bankruptcy, but before the adjudication, the bonding company took possession of the property, and, as possession is by statute, a substitute for recording, we have the question whether the amendment of 1910 vests the trustee with the rights of a lienholding creditor as of the date of the bankruptcy petition or as of the date of the adjudication. Since section 70*a* in general terms provides that the trustee is vested with the bankrupt's title as of the date of adjudication, it has been natural to assume that the rights of the trustee do not for any purpose reach back to the date of filing the petition; and there are decisions to that effect, or leaving the question open. *In re Rose* (D. C.), 206 Fed., 991, 993; *Big Four Co. vs. Wright* (C. C. A., 8), 207 Fed., 535, 537, 125

C. C. A., 577, 47 L. R. A. (N. S.), 1223; *In re Jacobson* (D. C.), 200 Fed., 812, 814.

"We can see no escape from applying to this situation the principle of the decision in *Acme Co. vs. Beekman Co.*, 222 U. S., 300, 32 Sup. Ct., 96, 56 L. Ed., 208, where it was held that, in spite of the language of section 70a, the trustee's rights extended, by relation, back to the commencement of the proceedings sufficiently to defeat the lien of an intervening attachment. The right of a general creditor to get a superior lien by levying an attachment and the right of the holder of an unrecorded mortgage to get a universally effective lien by recording the mortgage impress us as wholly analogous; and if the trustee's right goes back to the commencement of bankruptcy proceedings in the former case, it must be in the later. To the same general effect as the *Acme* case is *Everett vs. Judson*, 228 U. S., 474, 33 Sup. Ct., 568, 57 L. Ed., 927, 46 L. R. A. (N. S.), 154, which holds that interest of the trustee in a life-insurance policy maturing intermediate the petition and adjudication, is to be fixed as of the earlier date.

"We have applied the same principle to the right of the bankrupt debtor to discharge his debt by payment to the bankrupt after petition filed. *Toof vs. Bank*, 206 Fed., 250, 124 C. C. A., 118. The controlling principle must be that, for the purpose of fixing priority as between the trustee and adversely claiming lienholders, the time of filing the petition is the vital date, and that a lien which, on that date, was invalid as against creditors levying execution, cannot be perfected so as to make it valid against the trustee by action of the lienholder before adjudicated. Indeed, to hold the contrary would be to say that, so far as this section is concerned, the mortgagee could with safety withhold his mortgage from the record, relying upon the mortgagor not to file an involuntary petition long enough to give the mortgagee an opportunity to file his mortgage."

Mass. Bond. & Ins. Co. vs. Kemper, 220 Fed., 847, 850 (*Knappen, Dennison, and Sater. JJ.*).

In re Williamsburg Knitting Mill (Va.), 190 Fed., 871 (June 30, 1911), opinion by Waddill, J., *In re Lansman*, 183 Fed., 647, was disapproved. The court said of the amendment of June 25, 1910:

"The language used in this amendment is clear and comprehensive, and as viewed by the court unequivocally gives to the bankruptcy proceeding the effect of a lien. * * * The effect of this change is unquestionably radical and far-reaching. * * * It makes the date of the institution of the bankruptcy proceeding, the time as of which rights to and claims against the estate should be reckoned with and adjusted" (190 Fed., 877).

In *Millikin vs. Second National Bank of Baltimore* (Md.), 206 Fed., 14 (May 21, 1913), opinion by Pritchard, J., Boyd and Dayton, JJ., concurring, it was said of the amendment of June 25, 1910:

"A trustee occupies the same position as a judgment creditor with an execution in his hands *at the time of the adjudication*" (206 Fed., 16).

An unrecorded chattel mortgage was accordingly held invalid against a trustee in bankruptcy.

In the foregoing cases, it was not important whether the right of the trustee in his capacity as a lien creditor antedated the petition. In some cases, presently noted, it has been held such right of the trustee does not antedate the petition.

In re Farmers' Co-operative Co. of Barlow, N. D. (N. D.), 202 Fed., 1005 (February 8, 1913), opinion by Amidon, J., it was held of the amendment of June 25, 1910:

"The history of the statute * * * shows that those rights are obtained by the filing of a petition in bankruptcy. That act is by the amendment given the same force as the seizure of the property under execution or attachment by a creditor, *and cannot be*

given any retroactive effect. In re Jacobsen & Perrill (D. C.), 200 Fed., 812. If a creditor had levied upon the property here involved at the date of the filing of the petition, he would have acquired no rights as against the plow company, because it had filed its contract some time before; and the trustee, by the very language of the statute, has no higher right than such a creditor. The right to go back four months from the date of the filing of the petition in bankruptcy is confined to transactions which are specifically enumerated in the bankruptcy act, and the courts cannot properly apply those provisions to other transactions."

But the same judge, on the same day, in a case reported under the same name (202 Fed., 1008) held an unrecorded conditional sale contract invalid as against a trustee in bankruptcy. The court said:

"The trustee in bankruptcy derives his rights and powers from the statute, and not from the creditors of the estate. If any creditor under the local statute can obtain priority over an unfiled or unrecorded instrument by levy of attachment or execution, the trustee in bankruptcy, under section 47 as amended, has all the rights and remedies of such creditor.
* * * *A fair interpretation of the statute * * * gives to the trustee all the rights of the most favored creditor under the local law*" (202 Fed., 1010).

In *Hart vs. Emmerson-Brantingham Co. (Mo.)*, 203 Fed., 60 (February 10, 1913), opinion by Dyer, J., the action was in form to recover a preference. A conditional sale vendor, who had never recorded the contract, within four months prior to the bankruptcy retook the property which was the subject-matter of the contract. The court said of the amendment of June 25, 1910:

"It seems reasonably clear that the 'rights, remedies, and powers' with which the trustee is invested arise, by relation as of the date of the commencement of the bankruptcy proceeding, or as of the date of the adjudication of bankruptcy, and not as of an earlier date."

In *Big Four Impl. Co. vs. Wright (Kansas)*, 207 Fed., 535 (August 4, 1913), opinion by Willard, J., Sanborn and Carland, JJ., concurring, it was said of the amendment of June 25, 1910:

"This amendment must speak as of the time of the bankruptcy. The lien which the trustee is considered as holding must be a lien attaching as of that date. There can be no ground for saying that the lien is in existence before the bankruptcy" (207 Fed., 537).

In proceedings in bankruptcy there may be three, in any event two, dates of importance to be considered in connection with the question under consideration. In involuntary proceedings there may be the date of the petition, the adjudication and the selection of the trustee. In voluntary cases the adjudication and the filing of the petition may bear the same date, the trustee being selected at a later date.

Section 70a of the national bankruptcy act fixes the date on which the trustee acquires "the title of the bankrupt as of the date he was adjudged a bankrupt."

In *Everett vs. Judson*, 228 U. S., 474, 478, 479, the involuntary petition was filed December 27, 1910, and the adjudication January 9, 1911. One of the bankrupts died January 4, 1911. The question arose. Did the trustee in bankruptcy take the entire proceeds of the policy or only their cash surrender value at the time of the petition? The court ruled:

"While it is true that § 70a provides that the trustee, upon his appointment and qualification, becomes vested by operation of law *with the title of bankrupt* as of the date he was adjudged a bankrupt, there are other provisions of the statute which, we think, evidence the intention to vest in the trustee *the title to such property* as it was at the time of the filing of the petition. This subject was considered in *Acme Harvester Co. vs. Beekman Lumber*

Co., 222 U. S., 300, wherein it was held that, pending the bankruptcy proceedings and after the filing of the petition, no creditor could obtain by attachment a lien upon the property which would defeat the general purpose of the law to dedicate the property to all creditors alike. Section 70a vests all the property in the trustee which, prior to the filing of the petition, the bankrupt could by any means have transferred or which might have been levied upon and sold under judicial process against him. The bankrupt's discharge is from all provable debts and claims which existed on the day on which the petition for adjudication was filed. *Zavelo vs. Reeves*, 227 U. S., 625, 630-1. The schedule that the bankrupt is required to file, showing the location and value of his property, must be filed with his petition.

"We think that the purpose of the law was to fix the line of cleavage with reference to the condition of the bankrupt estate as of the time at which the petition was filed and that the property which vests in the trustee at the time of adjudication *is that which the bankrupt owned at the time of filing the petition*. And it is of that date, that the surrender value of the insurance policies mentioned in § 70a should be ascertained."

That case is cited as showing that the court construes the law so as to effectuate its intent.

"The exclusive jurisdiction of the bankruptcy court is so far *in rem* that the estate is regarded as *in custodia legis* from the filing of the petition."

Acme Harvester Co. vs. Beekman Lumber Co., 222 U. S., 300; 32 Sup. Ct. Rep., 96.

But the *Acme Harvester* case presented a question of jurisdiction. *Everett vs. Judson* dealt with the date on which *the title of the bankrupt passed* to the trustee.

But in the case at bar we have not a question of jurisdiction nor a question as to the title of the bankrupt. We have a question of the status of a trustee in bankruptcy as

a lien creditor. In the bankruptcy act as passed in 1898 there is a provision (section 67*c*):

"A lien created by or obtained in or pursuant to any suit or proceeding at law or in equity, including an attachment upon mesne process or a judgment by confession, which was begun against a person within four months before the filing of a petition in bankruptcy by or against such person shall be dissolved by the adjudication of such person to be a bankrupt if (1) it appears that said lien was obtained and permitted while the defendant was insolvent, and that its existence and enforcement will work a preference, or (2) the party or parties to be benefited thereby had reasonable cause to believe the defendant was insolvent and in contemplation of bankruptcy, or (3) that such lien was sought and permitted in fraud of the provisions of this act; or, if the dissolution of such lien would militate against the best interests of the estate of such person, the same shall not be dissolved, but the trustee of the estate of such person, for the benefit of the estate, shall be subrogated to the rights of the holder of such lien, and empowered to perfect and enforce the same in his name as trustee with like force and effect as such holder might have done had not bankruptcy proceedings intervened."

Under that provision, if the right of a trustee in bankruptcy to attack an instrument required to be recorded, for delay in its recording, was to be dependent on a creditor having fastened a lien upon the property prior to the recording, or for non-recording was to be dependent on a creditor having fastened a lien prior to the filing of the petition, the amendment of June 25, 1910, was unnecessary; for, if a lien had been actually fastened prior to the recording or the filing of the petition, as the case might be, the lien could have been preserved under section 67*c* for the benefit of the estate. The amendment of June 25, 1910, was adopted in order that in cases where no lien had been actually fastened prior to the bankruptcy, the trustee would

be deemed a lien creditor. The same reasoning which fixes his rights at a period prior to the adjudication does, as applied to the case of an instrument delayed in recording, fix his rights at a period anterior to the recording.

"The antidote must go with the bane." The remedy must be commensurate with the evil. The amendment of June 25, 1910, was designed to put the trustee in a situation to attack unrecorded instruments required by law to be recorded. He was given the rights of a creditor who had obtained a lien through legal process. The amendment does not say a creditor who *at the date of the petition* had acquired a lien. The language is, "All the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings" on the property in the custody of the court. As hereinbefore shown, some courts ruled, "Creditor holding a lien" meant there must be a real creditor who was *actually* "holding a lien." That view was repudiated in the cases hereinbefore cited in this brief. The amendment is construed to mean "*as if there were* a creditor holding a lien"; but when? We contend "creditor holding a lien" refers to that date necessary to give effect to the legislative intent to eliminate the evil of unrecorded agreements. As to a creditor extending credit prior to the recording of the instrument, it is no consolation to him to know if the instrument had never been recorded it would have been invalid; but, having been recorded, it has become valid, notwithstanding the extension of credit while the instrument was not recorded. As to such creditor, the evil was done through the delay in the recording of the instrument. The conditional seller cannot claim that such a rule is not just. At a trifling expense it might have recorded the instrument. It chose to refrain from doing so. Why should it not bear the consequences of its failure to obey a law founded on considerations of public policy and conducive to honesty in business life?

"The policy of the law in our State is that everything appertaining to or affecting the title of real

estate should appear in the public records. * * *

"In this case, Anderson voluntarily placed his fence in such a situation as to lead those who had no knowledge or notice of his arrangement with Thacher, to believe that it belonged to him on whose land it was situate. If he desired to protect his fence from the effect of a conveyance of the land by Thacher, he might have reduced the agreement between them to writing, and made it a matter of record. This he neglected to do, and if anyone is to suffer loss by reason thereof, it should be the one who was negligent, rather than a subsequent vendee, who upon an examination of the records found no record and had no notice of this claim."

Rowand *vs.* Anderson, 33 Kansas, 264, 268, 269.

Speaking of a statute requiring chattel mortgages to be recorded, it was said by the New York Court of Appeals:

"As was well said by Mr. Justice Leventritt at special term: 'The statute has been construed in favor of creditors along the broadest lines and in accordance with the most liberal principles of statutory construction. Technicalities have given way to equities; limitations, to liberality.'"

Zooker *vs.* Siegel-Cooper Co., 194 N. Y., 442, 447, 448.

In David Bradley & Co. *vs.* Kingman Implement Co., 112 N. W., 346 (Neb.), the court said:

"The object of the (recording) statute is to get rid of secret and latent liens. Public policy, as asserted in the extension of our registry laws, requires that the public record shall show the ownership of personal property, and a construction which is favorable to that end should be given to the act.

Knowles Loom Works *vs.* Vacher, 57 N. J. Law, 490; 31 Atl., 306; 33 L. R. A., 305."

VIII.

The contract at issue in the case at bar is, in effect, one of chattel mortgage and not of conditional sale.

The petition of the intervener alleges that the intervener "*sold and agreed to construct and deliver*" to the predecessor in title of the bankrupts the machine now in controversy. The price was fixed at \$5,940, payable in installments; "the said deferred payments to be evidenced by promissory notes for the several amounts bearing six per cent interest from their dates" (Rec., 4). That is to say, an absolute liability to pay the purchase price of the machine was created.

It was also pleaded "that it was further expressly understood and agreed * * * that the legal title to and *the legal possession of* the machinery * * * should be and remain (in) the said Baker Ice Machine Company *until the said Roy Grant should have* * * * paid for the same" (Rec., p. 4). It also pleads, as relating to the *actual possession* (p. 5), the machine was "delivered" to the purchaser, "installed in accordance with the terms" of the contract and "duly accepted by the purchaser." (See paragraph 4 of the petition in intervention.)

There was a provision to the effect (so alleged in the petition of intervention, Rec., p. 4) that upon the failure to pay one of the notes given by the purchaser when due "that then the whole of the unpaid purchase money arising under said contract *should thereupon at the option of said company* (the intervener) *become immediately due and payable.*"

The notes called for by the contract were executed (Rec., p. 5). In paragraph five of the petition in intervention it is admitted that of the purchase price of \$5,940 payments amounting to \$3,200.14 were made and a balance due of \$2,738.86 (should be \$2,739.86) is claimed with interest (p. 5).

In paragraph 7 it is pleaded: "That on the third day of July, 1912, the said Roy Grant, *having failed to pay the balance due on said purchase price*, as evidenced by said promissory notes as hereinbefore alleged and set out, and there being then *due and unpaid on said indebtedness* the said sum of \$2,738.86," possession of the machine was taken by intervener (Rec., 5, 6). The issue of the fact as to such possession being taken by the intervener was found against it by the referee. (See paragraph 12, Rec., p. 22.)

The contract which, it is claimed, creates a conditional sale is found in the record (pp. 7 *et seq.*). The seller proposed to the purchaser "to *furnish you an ice-making and refrigerating plant.*" Furnish whom? *The purchaser—not the seller.*

"We (the seller) will construct *and supply*" certain condensers. "There *shall be supplied by us*" (the seller) certain connections. "We (the seller) *will supply* the wrenches and tools" (p. 7).

Then, in great detail, is stated what the seller is to furnish and the purchaser provide (Rec., 8-11):

"We (the seller) will authorize and permit you to operate the said machine when placed within your premises, and to make use of our system as applied to the apparatus, together with all the several parts incidental thereto which are secured to us by letters patent, free from any royalty *over and above* purchase money hereinafter specified to be paid us during and after completion of said apparatus" (p. 11).

The contract also provided:

"Authority to use.—We will authorize and permit you to operate the said machine when placed within your premises, and to make use of our system as applied to the apparatus, together with all the several parts incidental thereto which are secured to us by letters patent, free from any royalty *over and above* purchase money hereinafter specified to be paid us

during and after completion of said apparatus" (Rec., p. 11).

* * * * *

"Guarantees.—We will construct the said ice-making and refrigerating plant in all of its parts in a thorough and workmanlike manner and under the stipulated conditions, will guarantee that the said plant will perform the work herein specified" (Rec., pp. 11, 12).

As already stated, the contract fixes the price to be paid the intervener for the machinery (Rec., pp. 12, 13). "The purchaser is to advance all money needed for freights, labor, board, local purchases and such other disbursements as would otherwise have to be made by us (the seller), deducting such advances from the last two payments" (p. 13).

"And it is further agreed, that as soon as the whole or any portion of the material for the machine and plant is delivered on the premises of the part of the second part (the purchaser), any loss or damage by fire or otherwise, is to be borne by the said part of the second part" (the purchaser) (p. 13).

The purchaser was required to keep the property insured "for an amount at least equal to the unpaid portion of the purchase price thereof, loss or damage under these policies to be made payable to the party of the first part (the seller) *as its interest may appear*" (p. 13).

It is further provided that in the event, upon a default by the purchaser, of a retaking by the seller of the property, "that then and in any such case the party of the second part (the purchaser) shall pay the party of the first part (the seller) all expenses incurred by the party of the first part under this contract, and for all damages to the party of the first part arising from the wear and tear of the said machinery, apparatus, or plant, and such further sum of money as will reasonably compensate the party of the first part for the use or rental by the party of the second part of the said

machinery, apparatus or plant, which said rental is hereby fixed and agreed to be six per cent per annum upon the total purchase price herein agreed to be paid, and to be calculated from the date when the machinery, apparatus or plant herein contracted for is ready to charge" (Rec., p. 14).

It is agreed that the seller "shall have the right to file a (mechanic's) lien for materials and labor furnished under this contract and this stipulation is hereby declared to be notice * * * of the intention to file a lien" (Rec., pp. 14, 15).

Taking this contract by its four corners and determining its nature by its legal effect, it is clear the same is one of mortgage. Indeed, curiously enough, the Court of Appeals did not unconditionally order a return of the machinery, the title to which it is claimed never passed to the bankrupts. On the contrary, the order was one of return unless the balance due on the purchase price was paid (Rec., 35).

In *Heryford vs. Davis*, 102 U. S., 235, certain railroad cars were delivered by a manufacturer to a railroad company, under a contract claimed to be one of loan for hire and sale on condition. Notes were given as collateral security for the return of the cars and the railroad company was given the option to purchase the cars by paying the amount of the notes; "but until such payment is made in full the said * * * (railroad company) shall have no right, title, claim or interest" in the cars. A judgment creditor of the railroad company levied on the cars. The contract was not recorded. The court construed the contract to be one of mortgage. "What, then, is the true construction of the contract? The answer to this question is not to be found in any name which the parties may have given the instrument, and not alone in any particular provision it contains, disconnected from all others, but in the ruling intention of the parties, gathered from all the language they have used. *It is the legal effect of the whole which is to be sought for.* The form of the instrument is of little account."

"It appears equally clear to us that the contract was not one of conditional sale. * * * It is quite unmeaning for parti to a contract to say it shall not amount to a sale, when it contains every element of a sale and transmission of ownership.

"The railroad company was not accorded an option to buy or not. They were bound to pay the price. * * * *This was in no sense a conditional sale.* This giving the property as security for the non-payment of a debt is the very essence of a mortgage which has no existence in a case of conditional sale."

After *Heryford vs. Davis*, *supra*, came *Harkness vs. Russell*, 118 U. S., 663. Mr. Justice Bradley, who dissented in the former case, wrote the opinion in the latter case. Mr. Chief Justice Waite, Mr. Justice Miller, Mr. Justice Field, and Mr. Justice Harlan concurred in each opinion.

In *Harkness vs. Russell* the instrument in controversy was quite simple in its terms (118 U. S., 664, 665). The instrument was to be governed by a statute of the Territory of Idaho. The case came to this court on appeal from the Supreme Court of the Territory of Utah, and the case is reported as *Russell vs. Harkness*, 4 Utah, 197. The action arose in these circumstances: Phelan & Ferguson bought machinery of Russell & Company, executing a document construed to be a conditional sale note. The machinery being in possession of Phelan & Ferguson, was delivered by them to the defendant Harkness "in part payment of an indebtedness due him and one Langsdorf. The court also found that defendant knew at the time he received the property that it had not been paid for by Phelan & Ferguson, and that plaintiff claimed title thereto" (4 Utah, 201; 118 U. S., 665).

A statute of the Territory of Idaho made invalid, except as between the parties thereto, an unfiled chattel mortgage.

In *Cowden vs. Finney*, 9 Idaho, 619, it was held a subsequent purchaser of mortgaged property, having actual notice

of the execution of the mortgage, though not recorded, takes his rights subject to the mortgage.

So, in all fairness, *Harkness vs. Russell, supra*, is largely *obiter*. Indeed, Mr. Justice Bradley admits:

"Whatever may be the law with regard to a *bona fide* purchaser from the vendee in a conditional sale, there is a circumstance in the present case which makes it clear of all difficulty. The appellant in the present case was not a *bona fide* purchaser without notice. * * * Under such circumstances it is almost the unanimous opinion that he cannot hold the property as against the true owners. But as the rulings of this court have been, as we think, somewhat misunderstood, we have thought it proper to examine the subject with some care and to state what we regard as the general rule of law, where it is not affected by local statutes or local decisions to the contrary" (118 U. S., 681).

In Black's Law of Judicial Precedents, p. 168, it is stated:

"A third kind of dicta are those which embody statements of legal principle more broad or general than is necessary for the determination of the case before the court, or after the specific questions involved have been decided. * * * lay down rules for similar or analogous cases. They are properly called 'gratis dicta.'

"The true ground of distinction between dicta and precedent is 'whether the statement made was necessary or unnecessary to the determination of the issues raised by the record and considered by the court. * * * A statement of law makes a precedent, not because it emanates from a wise and learned man, but because it is laid down by a judge, in his office of judge, and speaking to a question brought before him as a judge. * * * 'This court has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.' *Carroll vs. Carroll's Lessee*, 16 How., 275."

Black on the Law of Judicial Precedents, pp. 173, 174.

In *Harkness vs. Russell*, 118 U. S., 663, 680, it is said:

"The whole question in *Heryford vs. Davis* was as to the construction of the contract. This was in the form of a lease; but it contained provisions so irreconcilable with the idea of its being really a lease, and so demonstrable that it was an absolute sale with a reservation of a mortgage lien, that the latter interpretation was given to it by the court. * * * thus interpreted, the instrument inured as a mortgage in favor of the vendors, and ought to have been recorded in order to protect them against third persons."

The next case to be noticed is *Arkansas Valley Land & Cattle Co. vs. Mann*, 130 U. S., 69. Of the judges who concurred in *Harkness vs. Russell*, Mr. Justice Miller, Mr. Justice Field, Mr. Justice Bradley, Mr. Justice Harlan, Mr. Justice Gray, and Mr. Justice Blatchford concurred in the *Mann* case. The agreement in that case is set out (130 U. S., 76, 77). A seller of cattle was "to retain possession of the balance of the herd until the last payment is made." The court said:

"Slagle & Jordan certainly intended to vest Mann with the title, at the date of the bill of sale in question; for that instrument recites that the owners had, on the day of its execution, 'sold' the cattle to him. * * * Here are all the elements of an actual sale, as distinguished from an executory agreement. * * * The agreement in question was unlike that in *Harkness vs. Russell*."

Mr. Justice Bradley concurred in a case next in order.

"The fact that by agreement, the title is to remain in the vendor of personal property until the notes for the price are paid, does not necessarily import that the transaction was a conditional sale."

Chicago Railway Co. vs. Merchants Bank, 136 U. S., 268, 280.

"The agreement that the title should remain in the payee until the notes were paid * * * is a short

form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until all were fully paid" (136 U. S., 283).

In the last case cited, Mr. Justice Harlan, who had concurred in *Heryford vs. Davis* and *Harkness vs. Russell*, and written the opinion in *Arkansas Land & Cattle Co. vs. Mann*, speaking for the court, said (136 U. S., 282):

"It is a mistake to suppose that there is any conflict between these views and those expressed in the subsequent case of *Harkness vs. Russell*, 118 U. S., 663, 680, where the whole doctrine of conditional sales was carefully examined, and in which *the particular instrument* was held not to import an absolute sale, but only an agreement to sell upon condition that the purchasers should pay their note at maturity. With the principle laid down in the latter case we are entirely satisfied. But as pointed out in *Arkansas Cattle Co. vs. Mann*, 130 U. S., 69, 77, 78, the agreement in *Harkness vs. Russell* was upon the express condition that neither the title, ownership nor possession of the engine and sawmill, which was the subject of the transaction, should pass from the vendor until the note given by the vendee for the stipulated price was paid. Turning to the notes here in suit, we find every element of sale and transmission of ownership, despite the provision that the title to the cars should remain in the payee, until all of the notes of the series were fully paid" (136 U. S., 282).

"The cars having been sold and delivered to the maker (of the notes), the payee (in the notes) had no interest remaining in them (the cars) except by way of security for the payment of the notes given for the price" (136 U. S., 284).

"It was well said by Judge Bunn, at the trial, that the inference * * * would be 'that the freight cars had already been sold by the payee to the maker, and that the payee was to retain a lien and security upon them, in the way of a mortgage, for the payment of the purchase price'" (136 U. S., 286).

In *Beardsley vs. Beardsley*, 138 U. S., 262, 266, a quotation was made approvingly from *Heryford vs. Davis*, *supra*, and the instrument in controversy was held—

“a sale with reservation of security. * * * It is an equitable mortgage and the rights created and assumed by it are like those created and assumed when the owner of real estate conveys by deed to a purchaser, and takes back a mortgage as security for purchase money” (138 U. S., 267).

In *McGourkey vs. Toledo & Ohio Central Railway Company*, 146 U. S., 536, certain instruments claimed to be leases of rolling stock were treated as mortgages.

“If, however, the property, though nominally leased by the railway company, was acquired under an arrangement which amounted in law to a purchase of it,” the title will be held to have passed to the railway company.

“We are of opinion that this transaction should be adjudged to be in law what it appeared to be in fact—a purchase by the railway of the rolling-stock in question.”

“We think the court below was correct in holding that these leases, so far as they are a security at all, must be treated as mortgages. Reading between the lines of these instruments, it is quite evident that * * * the retention of title by the lessor was intended as mere security for the purchase money.”

“In the Federal courts, whether an agreement, under which one party obtains possession from another of a chattel in which the latter seeks to reserve some kind of title, shall be construed to be a hiring, a conditional sale, or a mortgage, depends altogether upon its effect and not at all upon what the parties call it.”

Corbett vs. Riddle, 209 Fed., 811, 815 (*Pritchard, Woods, and Rose, JJ.*).

“That the contract is ‘an instrument in the nature of a mortgage’ seems evident. * * * Roof (the bankrupt) is styled in the contract ‘buyer’ and ‘pur-

chaser'; he is a debtor because he is to give notes promising unconditionally payment of the purchase money."

Townsend vs. Ashefoo Fertilizer Co., 212 Fed., 97, 100 (Pritchard, Woods, and Rose, JJ.).

In 3 Enc. United States Supreme Court Reports, page 745, the rule is stated: "Whether a transaction is a conditional sale or a mortgage is to be ascertained by determining whether it was a mere agreement to sell upon a condition to be performed, or an absolute sale, with a reservation of a lien or mortgage to secure the purchase money."

At page 746: "The court will examine extrinsic circumstances to determine whether a contract is to be construed as a conditional sale or a chattel mortgage."

In *Wm. W. Bierce, Ltd., vs. Hutchins*, 205 U. S., 340, 348, the suit was in replevin for certain property delivered to another, and sold by a receiver of that other to a third party with full notice of the seller's claim. The original sale was held to be conditional on the purchase price being paid. No rights of lien creditors nor any recording statute was involved. Nor was any distinction taken between a mortgage or a conditional sale. The court said: "The contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful. *Harkness vs. Russell*, 118 U. S., 663. So that the only question is whether any other provision of the contract is inconsistent with this one or qualifies and explains it as intended to do less than it purports to do when taken alone. *Chicago Railway Co. vs. Merchants National Bank*, 136 U. S., 268."

In *Bryant vs. Swofford Bros.*, 214 U. S., 279, 290, the contract between the parties in that case, determined according to the laws of Arkansas, was held to be one of conditional sale.

In *Palmer vs. Howard*, 72 Cal., 293; 1 Am. St. Rep., 60, it is said: "The policy of the law is against upholding secret liens. * * * Where it is clear from the whole transaction that for all practical purposes the ownership of property was intended to be transferred, and that the seller only intended to reserve a security for the price, any characterization of the transaction by the parties, or any mere denial of its legal effect, will not be regarded." In a note by Mr. Freeman, 1 Am. St. Rep., 64, it is said:

"With respect to the construction of contracts claimed to be conditional sales, the Supreme Court of the United States has wisely said" (quoting from *Heryford vs. Davis*).

"The question as to what was the real object or purpose of the parties to that agreement * * * were questions to be determined by the court upon a construction of the instrument, fairly considering all its real provisions, with a view of finding therefrom what was the real intention of the parties" (citing *Heryford vs. Davis*).

Chickering vs. Bastress, 130 Ill., 206; 17 Am. St. Rep., 309, 310.

In a note by Mr. Freeman (46 Am. St. Rep., 295) it is said: "Cases involving the question as to whether it is a transaction is or is not a conditional sale must each be determined by its own peculiar circumstances, and intention of the parties in these, as well as in most other transactions, is the true test, and must be collected from the condition annexed and the conduct of the parties as well as of the written contract," citing *Hughes vs. Sheaff*, 19 Iowa, 335 (in which case Dillon, J., concurred).

In *Stockton Savings & Loan Society vs. Purvis*, 112 Cal., 236; 53 Am. St. Rep., 210, it is said: "No clause in a contract in terms locating the title to the property forming the subject-matter of the contract in one of the parties is controlling upon a court, as against the provisions of the contract, taken as a whole, locating the title in the other party."

"The proper construction of the contract is not dependent on any name given to the instrument by the parties, and not on any one provision, but upon the entire body of the contract and the legal effect of it as a whole."

Arbuckle *vs.* Kirkpatrick, 98 Tenn., 221; 60 Am. St. Rep., 854; 36 L. R. A., 287.

In Hart *vs.* Barney & Smith Mfg. Co., 7 Fed., 543, a contract claimed to be one of conditional sale was held within the terms of a Kentucky statute providing: "No deed of trust or mortgage conveying a legal or equitable title to real or personal estate shall be valid" unless recorded. Heryford *vs.* Davis was cited (7 Fed., 551).

Other citations of Heryford *vs.* Davis are to be found in—

Union Stock Yards & Transit Co. *vs.* Western Land & Cattle Co., 59 Fed., 49, 53.

Williams *vs.* Drummond Tobacco Co., 17 Tex. Civ. App., 635, 640.

Bailey *vs.* Hervey, 135 Mass., 172, 174.

Graham *vs.* Sadlier, 165 Ill., 95, 97.

Parke, etc., Co. *vs.* White River Lumber Co., 101 Cal., 37, 39.

Kelley, Maus & Co. *vs.* Sibley, 137 Fed., 586, 591.

D. A. Tompkins Co. *vs.* Monticello Cotton Oil Co., 137 Fed., 625, 629.

Coweta Fertilizer Co. *vs.* Brown, 163 Fed., 162, 165 (Lurton, J.).

In Harkness *vs.* Russell, 118 U. S., 663, 678, it is said, speaking of the doctrine announced in that case: "The law has been held differently in Illinois." The doctrine prevailing in that State was outlined and was held to have become "a rule of property in Illinois, and we have felt bound to observe it as such."

The case of Hervey *vs.* Rhode Island Locomotive Works, 93 U. S., 664, was distinguished from the instant case, in

that "the only points decided in that (the Hervey) case were, first that it was governed by the law of Illinois, the place where the property was situated; second," etc. (118 U. S., 679, 680). "There is nothing either in the statute or adjudged law of Idaho to prevent, in this case, the operation of the general rule" (118 U. S., 681).

"The legal effect of the transaction depends upon the local law."

Taney *vs.* Penn. Bank, 232 U. S., 174, 180.

Dale *vs.* Pattison, 234 U. S., 399, 404.

Mishawaka Woolen Mfg. Co. *vs.* Westveer, 191 Fed., 465, 466.

Let us then take up the decisions in Kansas, the *lex loci* in the case at bar.

In *Christie vs. Scott*, 77 Kansas, 257, the plaintiff had sold the defendant an article of personal property, taking notes providing "the right or title or ownership does not pass from W. L. Christie (the seller) until this note and interest is paid in full." Provision was also made, in the event of a recaption of the property, for a sale thereof and an application of the proceeds, on the note. The notes not having been fully paid, the seller retook the property, sold it, credited the proceeds on the notes, and sued the purchaser for the balance due (pp. 258, 259). At page 260, the court said: "It is contended on the part of defendant, as it appeared in each cause of action from the contract attached to the promissory note, that the plaintiff reserved the title and right of possession of the property sold, the price of which constituted the only consideration for the note, and thereafter took possession of the property and sold it, that this constituted a revocation of the contract of sale and no consideration remained for the note; in other words, *that the transaction constituted a conditional sale*, and upon the defendant's breaking the condition of payment, the plaintiff elected to avoid the sale, or should be conclusively presumed to have elected to avoid the sale, by the

taking of the property, and that the plaintiff could not thereafter recover on the note.

"Authorities are cited from several States which hold that, where the contract attached to the note shows the seller retained the title and the right of possession of the property until payment was made, and took possession of the property under the contract, the consideration for the note thereby failed and he cannot recover upon the note." Reference is made to the provision in the note (p. 258) and the court continues: "This is a plain recognition of the obligation to pay the note after the taking of the property" (p. 260).

But, says the court: "At least since the enactment of section 4257 of the General Statutes of 1901, providing for the recording of such notes as chattel mortgages, *these contracts should be regarded as on the same basis as chattel mortgages*. Indeed the transaction, reserving the title and right of possession and right to retake the property, is intended and operates simply as a security for the debt. The transaction does not essentially differ from the one in which the seller, at the time of making a sale, takes a promissory note for the purchase-price and at the same time, and before he has really transferred the property sold, takes a mortgage thereon to secure the note—the purchase price. * * * There is a theoretical distinction between the two transactions, but no practical difference" (p. 261).

The United States Circuit Court of Appeals for the Eighth Circuit has failed to give "full faith and credit" to this case, either in the interpretation of what was therein decided, or in recognizing it as a controlling authority. In *Big Four Implement Co. vs. Wright*, 207 Fed., 535, 539, that court, speaking of *Christie vs. Scott*, observed: "The only question which the court decided in that case was that a vendee in a conditional sale contract was liable on his promissory notes, although the creditor had retaken the property." And in the case at bar, reported below as *Baker Ice Machine Co. vs. Bailey*, 209 Fed., 603, 605, this delineation of *Christie vs.*

Scott was restated. But *Christie vs. Scott* did not decide what the Court of Appeals claims it did. It decided the contract in issue in that case was practically a chattel mortgage and its legal effect was to be determined on that basis.

In the portion of the brief hereinafter devoted to the proposition that the clause in the contract with respect to the filing of a mechanic's lien by the seller operated as an election to treat the obligation of the purchaser to pay the price as absolute and to pass the title to the purchaser, the authorities are collected to the effect that in the case of a conditional sale the retaking by the seller of the property operates to relieve the purchaser from the obligation to pay the purchase price. So, before the court in *Christie vs. Scott* could have held the purchaser for the unpaid balance, notwithstanding the retaking of the property by the seller, the court must have reached the conclusion that the transaction in question was not a conditional sale, but a mortgage.

The statute cited in *Christie vs. Scott*, 77 Kansas, 257, 260, 261, as General Statutes of 1901, section 4257, is the same as General Statutes of 1909, section 5237. The section was enacted originally in 1889 (Laws of Kansas, 1889, page 387) and amended in 1901 (General Statutes of Kansas, 1901, page 898, section 4257).

Osborne vs. Connor, 4 Kansas Appeals, 609, is by a State intermediate appellate court, and hence only persuasive, not controlling authority, in a Federal court.

Angle-American Land, M. & A. Co. vs. Lombard, 132 Fed., 721, 741, 742.

But in the *Osborne* case it was held: "While the clause set out in the notes with reference to the retention of title, the ownership and right of possession of property in the payee, would indicate that a conditional sale was intended, we think the other provisions of the notes evidence an absolute sale of the binder, with a retention of the title and right of possession only by way of security for the payment of the pur-

chase price, and that the agreement for such retention was in effect a short form of chattel mortgage" (4 Kansas Appeals, 613).

"The rule of law that permits a vendor to retain the title to goods bartered by him, and placed apparently in the exclusive possession, control and ownership of the vendee, until the whole purchase price is paid, without notice to parties dealing with such vendee is, at best, a harsh one, and should not be enforced except in cases where the agreement to hold the title is positive and ambiguous."

Quoted from *Edwards vs. Symons*, 65 Mich., 348, 355, in *Mishawaka Woolen Mfg. Co. vs. Westveer*, 191 Fed., 465, 470 (an instructive case), in which the plea of conditional sale was denied.

In some cases "instruments designated as and in the form of leases, and usually providing for the payment of rent and stipulating that in default of payment the lessor may retake the goods, but that on payment the property in the goods shall pass to the lessee (35 Cyc., 656) * * * have been construed to be absolute transfers with a reservation of a lien to secure a purchase price and in effect chattel mortgages. If goods are delivered to the buyer under an agreement whereby the property in the goods is transferred with reservation of a lien to secure the purchase price, the transaction is a mortgage. But if the goods are delivered under an agreement by virtue of which there is no conveyance of title, but the property in the goods is to remain in the seller until payment of the price, the transaction is not a mortgage but a conditional sale. Generally the question whether the transaction is a conditional sale or a mortgage is one of intent of the parties to be determined from a consideration of all the provisions of the contract. * * * Of course, if the transaction is clearly intended merely to secure a debt, the contract must be construed to be a mortgage and not a conditional sale."

35 Cyc., 658, 659, 660.

In *Contracting & Building Co. vs. Continental Trust Co.*, 108 Fed., 1, 3, Lurton, J. (Day and Severens, JJ., concurring), said of an agreement of lease of locomotives: "The real transaction was a bargain and sale, the title being retained *as security* for the purchase money." It was also said: "The retention of title was intended as a mere mode of securing the payment of the purchase price."

An examination of the Kansas cases cited by the Circuit Court of Appeals in *Big Four Implement Co. vs. Wright*, 207 Fed., 535, and in the instant case (Rec., pp. 33-35), will disclose, all therein decided is the particular instrument under consideration was in the form of a conditional sale.

In the case at bar the Circuit Court of Appeals reiterated its statement in *Big Four Implement Co. vs. Wright*, 207 Fed., 535, 539:

"The statutes of Kansas recognize the difference between a chattel mortgage and a conditional sale contract, *by providing separate and different provisions for filing*" (*Baker Ice Mach. Co. vs. Bailey*, 209 Fed., 603, 605).

Reference is made (207 Fed., 539) to General Statutes of Kansas, 1909, section 5224, requiring the recording of chattel mortgages. It is respectfully submitted the court was in error in this statement. "The provisions for the filing" are the same. Indeed, section 5237, General Statutes of Kansas, 1909, with respect to conditional sales, requires them to be filed with the register of deeds and "entered upon the records of the same *as a chattel mortgage*." There is a provision in section 5237, not quoted by the Circuit Court of Appeals (207 Fed., 539), which provides: "Where the amount of the note or indebtedness referred to in section 1 (of the original act, which in its entirety became section 5237) shall have been fully paid by the vendee, the vendor shall release the same under the same terms, conditions, and penalties *as are now required by law relating to chattel mortgages*."

It is true that there is a difference in this respect: a chattel mortgage is required to be renewed every two years, while a conditional sale, if recorded, remains "in full force and effect until the amount of the same is fully paid, without the renewal of the same" (section 5237; 207 Fed., 539).

But in *Paul vs. Lingenfelter*, 89 Kansas, 871, decided June 7, 1913, it is said:

"No reason can be suggested for regarding contracts of this character (conditional sale) as any different in effect from chattel mortgages" (89 Kansas, 873).

Again:

"The opinion (in *National Bank vs. Tufts*, 53 Kansas, 710) very properly attempted to place the statute providing for the recording of title notes upon the same basis as that providing for recording chattel mortgages. While the language of the two statutes is not identical, there is no reasonable ground for construing them differently, or for holding that actual notice of an unrecorded title or sale note should affect a creditor any more than actual notice of an unrecorded chattel mortgage" (89 Kansas, 873).

Paul vs. Lingenfelter, 89 Kansas, 871, a conditional sale case, is cited as authority in *Abernathy vs. Madden*, 91 Kansas, 809, a chattel mortgage case.

National Bank vs. Tufts, 53 Kansas, 710, 712, was a conditional sale case. The court said of the recording statute with respect to conditional sales: "*We have a similar statute concerning chattel mortgages*" (53 Kansas, 712).

Taking up the Kansas cases cited by the Circuit Court of Appeals in *Big Four Impl. Co. vs. Wright*, 207 Fed., 535, 539, quoted in *Baker Ice Mach. Co. vs. Bailey* (the case at bar), 209 Fed., 603, 605, it is important to remember, in the case at bar, it is not contended there can be no conditional sales in Kansas. It is contended in the case now being

determined, the contract in issue is not one of conditional sale, but one of chattel mortgage.

Sumner vs. McFarlan, 15 Kansas, 600, was an action in replevin. The opinion is by Judge (afterward Mr. Justice) Brewer, who wrote the opinion in *Beardsley vs. Beardsley*, 138 U. S., 262, in which case (138 U. S., 266) the learned judge observes: The significance and import of the instrument "is not to be determined by any separate clause, but by the instrument as a whole." In the latter case, Mr. Justice Brewer, speaking for the court, held the instrument there in question "not a contract to sell, but a sale with reservation of security" (138 U. S., 266).

In *Sumner vs. McFarlan*, *supra*, plaintiff delivered an organ to McNulty under a contract held to be one of conditional sale.

"The terms of the contract were as follows:

" 'It is hereby agreed between the maker of this note and A. Sumner, that the organ No. 42,914, for the use of which to the maturity thereof this note is given, is and shall remain the property of A. Sumner, and that in default of payment thereof said organ shall be returned to said Sumner, his agent or attorney.' "

In *Hall vs. Draper*, 20 Kansas, 137, 139, the opinion is also by Judge (afterward Mr. Justice) Brewer. The court said:

"In this respect such a conditional sale differs from an absolute sale with a mortgage back. In such case the vendee has everything except as limited by the terms of the mortgage. Here he has nothing except as expressed by the contract" (p. 140).

In *Standard Impl. Co. vs. Parlin & Orendorff Co.*, 51 Kansas, 244, it is ruled: "When goods are sold at a fixed price to be paid thereafter, and delivery is made upon the express condition that until the price is paid the title is to remain in the vendor, payment is a condition precedent, and

until made the property is not vested in the purchaser," citing *Hallowell vs. Miene*, 16 Kansas, 65, in which case the opinion is by Judge (afterward Mr. Justice Brewer).

In *Moline Plow Co. vs. Witham*, 52 Kansas, 185, 189, it appears: "Under the written contract * * * the ownership of the goods in controversy was to remain in the plow company until paid for in cash." Held, a contract of conditional sale.

But in *Christie vs. Scott*, 77 Kansas, 257, the contract in question was held to be one of mortgages; and in *Paul vs. Lingenfelter*, 89 Kansas, 871, and *National Bank vs. Tufts*, 53 Kansas, 710, statutes governing the recording of chattel mortgages and conditional sales are construed as in *pari materia*.

In the court below (209 Fed., 604) *Harkness vs. Russell*, 118 U. S., 663, is cited as authority. That case has been hereinbefore extensively reviewed. *Bryant vs. Swofford Bros.*, 214 U. S., 279, is also cited (209 Fed., 604). That case is placed on the doctrine, "In bankruptcy the construction and validity of such a contract must be determined by the local laws of the State" (in that instance, Arkansas), 214 U. S., 290, 291.

This leaves to be considered a series of cases in the eighth circuit cited in the two opinions now being considered (207 Fed., 538; 209 Fed., 604).

Dunlop vs. Mercer, 156 Fed., 545, the question at issue is thus stated: "Does this contract (the one in controversy) evidence an absolute or a conditional sale" (156 Fed., 548).

In *re Pierce*, 157 Fed., 755, held the contract involved in that case to be one of conditional sale. The same result is reached in *Monitor Drill Co. vs. Mercer*, 163 Fed., 943; 20 L. R. A. (N. S.), 1065.

But all of these cases were decided after *York Mfg. Co. vs. Cassell*. In none of them was the question arising in the case at bar vital. All of them were placed on the ground the trustee in bankruptcy was not a lien creditor. Two of the cases arose in Minnesota; one in North Dakota.

In Minnesota, a chattel mortgage unrecorded is invalid only as against "creditors." Revised Laws of Minnesota, section 3461.

(It is interesting to note, Revised Laws of Minnesota, section 3476, required a conditional sale contract to be filed "as in the case of a chattel mortgage.")

When *Dunlop vs. Mercer* was decided, a trustee in bankruptcy did not answer to the description of "a creditor."

In North Dakota, Compiled Laws of North Dakota, 1913, section 6758, unrecorded mortgages of personalty are void as "against creditors." A trustee in bankruptcy at the time of *In re Pierce* was held to be not "a creditor" (157 Fed., 756).

(Compiled Laws of North Dakota, 1913, section 6757, conditional sale contracts are required to be "filed and indexed the same as a mortgage of personal property.")

The real question involved in the three cases now being considered (*Dunlop vs. Mercer*, *In re Pierce*, and *Monitor Drill Co. vs. Mercer*) was not a differentiation between a chattel mortgage and a conditional sale merely as such. In either case, as against a trustee in bankruptcy, in the then state of the law, an unrecorded chattel mortgage and an unrecorded conditional sale contract were valid unless vitiated for fraud. All of the cases involved merchandise intended for resale. The contention was made "the agreement was fraudulent and voidable against the trustees, because it permitted the conditional vendor (should be vendee) to sell the merchandise in the regular course of business, but provided that the proceeds should be credited upon its notes and accounts or held as collateral security therefor" (156 Fed., 549). "The trustee says the sale was absolute, not conditional, because the bankrupt, a merchant, was authorized to resell the property in the usual course of his business" (157 Fed., 756). We quote from the brief of appellee in *Monitor Drill Co. vs. Mercer*, 163 Fed., 943:

"If our contention up to this point be correct, viz., that the instrument in question was, in effect, a

chattel mortgage, and that no immediate application of proceeds of sales was either required under the terms and conditions thereof, or was in fact made, then it necessarily follows, under the decisions of the Supreme Court of the State of Minnesota, as well as of this court, *that the contract was fraudulent in law.*"

It thus appears the true question in these three cases, was this: Not was the contract merely a chattel mortgage without more or a conditional sale without more, but was it fraudulent in fact, whatever its character, because it contemplated an interest in one not in possession, in merchandise held by another for the purpose of resale.

"It has * * * been held in some States that where goods are knowingly sold for the purposes of resale, reservations of title are invalid" (35 Cyc., 665).

The doctrine of the text is supported by Winchester, etc., Co. *vs.* Carman, 109 Ind., 31; 58 Am. Rep., 382. In a note to that case (58 Am. Rep., 386), the following are cited to the same effect:

Ludden *vs.* Hazen, 31 Barb., 650.

Fitzgerald *vs.* Fuller, 19 Hun., 180.

Lewis *vs.* McCabe, 49 Conn., 141; 44 Am. Rep., 217, is to the contrary; that case is followed, *In re* Pierce, 157 Fed., 755, 756.

Pratt *vs.* Burhans, 84 Mich., 487; 22 Am. St. Rep., 703, is also to the contrary.

The Tennessee doctrine is against the validity of such a conditional sale.

Star Clo. Mfg. Co. *vs.* Nordeman, 118 Tenn., 384.

Coweta Fert. Co. *vs.* Brown (Lurton, J.), 163 Fed., 162, 166.

In re Rodgers, 125 Fed., 169, 177 (cited but not followed in *Dunlop vs. Mercer*, 156 Fed., 549), it is said: "The policy

of the law of the State of Illinois denounces all secret liens upon property."

In re Galt, 120 Fed., 443, is an Illinois case.

In re Carpenter, 125 Fed., 831, 833, reflected the law of New York; so does *In re Garcewich*, 115 Fed., 87.

In re Rasmussen's estate, 136 Fed., 704, arose in Oregon.

The same principle which condemns a conditional sale contract for the reasons stated, likewise condemns a chattel mortgage.

But in *Dunlop vs. Mercer*, 156 Fed., 545, 549, the cases holding such a contract, that is, of conditional sale of merchandise intended for resale fraudulent were not followed. "But the general rule and the weight of authority in this country, the established rule of property in Minnesota, and the established rule of this court are otherwise." See also *In re Pierce*, 157 Fed., 755, 756.

It is therefore respectfully submitted the three cases from the eighth circuit (*Dunlop vs. Mercer*, 156 Fed., 545; *In re Pierce*, 157 Fed., 755; *Monitor Drill Co. vs. Mercer*, 163 Fed., 943) are not authoritative expositions of the true differentiation between chattel mortgages and conditional sales *per se* and stripped of features claimed to be fraudulent in their nature.

As to the nature of the instrument, the following authorities are also in point:

In *Howard vs. Simpkins*, 70 Ga., 322, a conditional sale note was held to be a negotiable instrument, the court saying:

"The note * * * reserved a right to the payee; none to the makers. They bind themselves to pay the money at maturity in any event. He reserved the title to the buggy as a security until all that became due is paid."

In a note, 6 L. R. A., 643, it is said:

"In all cases, the court will incline to construe a transaction as a chattel mortgage rather than a conditional sale" (citing a number of cases).

The same doctrine is stated in 6 Cyc., 994, in this form:

"It has been held that where the circumstances are doubtful, courts of equity incline against conditional sales."

"After the formation of a contract of sale, the question of its effect arises as to when the bargain amounts to an actual sale, or when it is a mere executory agreement. The distinction between the two contracts consists in this: That in a bargain and sale, the thing which is the subject of the contract becomes the property of the buyer the moment the contract is concluded * * *: whereas, in the executory agreement, the goods remain the property of the seller until the contract is executed. This distinction is of importance in two connections: *First, as between the parties to the contract, in order to determine upon whom the loss shall fall in case the property is destroyed; for it is plain that if the subject of the sale is lost or destroyed, the loss must fall on the party who sold the chattel.*"

24 Am. & Eng. Enc. of Law (2d ed.), pp. 1045, 1046.

But in the case at bar, the contract provides:

"As soon as the whole or any portion of the material for the machine and plant is delivered on the premises of the part-- of the second part any loss or damage by fire or otherwise, is to be borne by the said part-- of the second part."

As the loss is thus made to rest on the alleged conditional sale vendee, all thought of conditional sale is negatived.

In *Coweta Fertilizer Co. vs. Brown*, 163 Fed., 162, 165, Judge (afterward Mr. Justice) Lurton said (Richards and Knappen, JJ., concurring): "All of the rights *and risks* of ownership pertain to the buyer. * * * Every risk of loss by blameless accident rested on Brown. We agree with the court below that under this contract the liability of Brown was that of a purchaser." The agreement in question was held to create an equitable mortgage.

"It is impossible not to see that under the agreement evidenced by the note, the engine in the hands of the plaintiff was a mere security for the payment of the note. It was in fact a mere security for the payment of the note. It was in fact a collateral security for the payment of the purchase price. Though not technically a chattel mortgage, the note gave rise to relations between the conditional vendor and his vendee, as between themselves, of a similar character."

Mott vs. Havana National Bank, 22 Hun. (N. Y.), 354, 357.

In *Smith vs. Gilmore*, 7 App. D. C., 192, the action was in replevin by a conditional vendor. The conditional vendee died and the property was sold under an order of the court of probate jurisdiction. The conditional vendor thereupon applied to the court of probate jurisdiction for a payment of the balance due out of the price realized for the sale of the property. The court of probate jurisdiction denied the request. Thereupon, the conditional vendor brought an action in replevin against the purchaser of the piano. The court said:

"In dealing with this contract, a court of equity invested with the power to look beyond the mere form into the substance of the instrument, in order to discover its real meaning, would be strongly inclined to treat the sale of the piano as made with the reservation of a lien for the purchase money. * * * And if this were a proceeding in equity involving the right of the vendor, not only to reclaim the instrument, but also to retain as forfeited, the payments that have been made under the contract, we should have no hesitation in construing the instrument so as to deny his right to them both."

In *Baldwin & Co. vs. Crow*, 86 Kentucky, 679, a piano was sold. Notes were given containing a recital that "said instrument remains the property of * * * (the seller) until all notes given for the instrument are paid." The court said:

"In determining whether a contract is to be regarded as a conditional sale or mortgage 'the particular form or words of the conveyance are unimportant; and it may be laid down as a general rule, subject to few exceptions, that whenever a conveyance, assignment or other instrument transferring an estate is originally intended between the parties as a security for money, or for any other encumbrance, whether the intention appear from the same instrument or from any other, it is always considered, in equity, a mortgage.' (Story's Equity, section 1018.) It is manifest the object of the contract under consideration was to secure payment of the agreed purchase price, and it should therefore be regarded as an absolute sale and mortgage back, and such has been the uniform ruling of this court in similar cases."

In *Munroe vs. Williams*, 35 S. C., 572, 578, the court said:

"This ground is based upon the fact, that in the contract the title to the lumber is reserved until the purchase money was paid. This at most amounts to nothing more than a mortgage."

In *Straub vs. Screven*, 19 S. C., 445, 448, it was said of notes claimed to be conditional sale notes:

"It is very clear that the plaintiff and defendant, by virtue of their contract, as evidenced by the notes, stood towards each other in the relation of mortgagor and mortgagee."

As bearing upon the intention of the parties, as to whether or not the property sold should remain the property of the seller, or whether the purchaser should acquire the same, subject only to the right of the seller to hold the property by way of security for the purchase price, the attention of the court is called to other phases of the contract.

In the course of this brief it has been pointed out that in determining the question whether a contract is one of conditional sale or one of mortgage the court will take into

consideration all of the terms and conditions of the contract, together with all the extrinsic circumstances surrounding the subject-matter thereof.

In the petition of intervention it is pleaded that the intervener "agreed to construct and deliver" to the predecessor in title of the bankrupts, a complete plant, "a certain ice-making and refrigerating apparatus."

It is claimed in the petition that it was agreed in the contract "that the legal title to and the legal possession of the machinery, apparatus, and appurtenances of the said ice-making and refrigerating apparatus, should be and remain" in the intervener.

It is further pleaded that "in default of payment of the notes the intervener should have the right to enter upon the premises upon which said machinery and apparatus should be installed, and take exclusive possession of the same, and carry the same away without being liable in any way therefor to the said Roy Grant" (Rec., pp. 4, 5).

It is pleaded that "the said ice-making and refrigerating apparatus and plant" was delivered to the purchaser, "and was installed in accordance with the terms" of the contract.

The prayer of the petition is "that the court may find and determine that it (the intervener) is the owner of the said ice-making and refrigerating apparatus hereinbefore referred to and described" (Rec., p. 6).

Taking up the contract, we find it in the form of a proposal—"we, the seller, hereby propose to furnish you (the purchaser) an ice-making and refrigerating plant." There is a specification as to certain parts of this plant (Rec., p. 7).

Then follows an obligation on the part of the purchaser "to construct and provide at your (the purchaser's) own cost and expense all suitable and proper foundations, upon which engine, compressor, and other machinery is to be placed; you (the purchaser) to be responsible for building same
* * * you (the purchaser) are also to do all necessary grouting after the machinery is set."

It is further provided that the purchaser is "to provide the necessary sewer connections, and to bring the water supply where required." The purchaser is to provide "a good and sufficient light to enable us (the seller) to put up work in dark places. You (the purchaser) to furnish the material for and to do all carpenter or mason work that may be required. * * * And you (the purchaser) to dig the necessary trenches required" (Rec., p. 8).

The purchaser is required to furnish "a suitable foundation for the freezing tank" and "insulation between the foundation and the bottom of the freezing tank."

It is further provided that "all steam, exhaust, and water pipes with valves and fittings, except those specified above, to be furnished by" the purchaser.

The purchaser was to furnish "suitable platforms and supports on which to set the thawing apparatus and the different vessels of condensing and filtering apparatus."

The purchaser was to supply "proper insulation of pipes where they are exposed to the action of warm air" (Rec., p. 9).

The purchaser was to provide "suitable buildings in which the plant may be erected and operated."

It was further provided that the purchaser was to supply "all necessary insulation required for exposed piping and rooms" (Rec., p. 10).

The purchaser was required to pay "the freight and cartage to and at the place of erection." The purchaser was to provide "all the labor required for assisting in the erection of the plant." The purchaser was to provide "a workshop" and "the necessary power, water, oil, and waste for operating the machinery or for use during the erection and testing of the machine or plant."

In the contract it is provided: "The purchaser is to advance all money needed for furnishing the labor, board, local purchases, and such other disbursements as would otherwise have to be made by us" (the seller) (Rec., p. 13).

In the face of all this, it is provided in the contract "the legal title to * * * the machinery, apparatus, and appurtenances therein set forth shall be and shall remain in the said party of the first part" until the purchase price is paid in full (Rec., p. 13).

The contract on its face shows that a large portion of "the machinery, apparatus, and appurtenances" was in fact furnished by the purchaser.

The foregoing provisions of the contract negative the idea that the purchaser was to furnish all the things which the contract requires the purchaser to furnish, and then allow the seller, in the event that default was made in the payment of the purchase price, to take all the things which the purchaser had furnished.

As bearing on the true interpretation of the contract in issue in this case, the court is reminded that in the contract it is provided: "As soon as the whole or any portion of the material for the machine and plant is delivered on the premises" of the purchaser, "any loss or damage by fire or otherwise is to be borne by the purchaser." It is also recited in the contract: "As soon as the whole or any part of the material arrives on the premises of * * * (the purchaser) and until the * * * (seller) has been fully paid in cash * * * (the purchaser) shall keep the same insured against loss or damage by fire in such insurance company as approved by * * * (the seller) for an amount at least equal to the unpaid purchase price, loss or damage under these policies to be made payable to the * * * (seller) *as its interest may appear.*" The policies are to be delivered to the seller, and if the purchaser fails to insure the machine, the seller is privileged to insure it in its favor at the expense of the purchaser, and the purchaser is to pay the seller, on demand, the premiums paid for such insurance (Rec., p. 13).

The authorities hereinafter cited show that many of them, including the leading case in this court (Grant *vs.*

United States, 7 Wall., 331, 337), announce the doctrine that where property is destroyed, the party in whom the title is vested must bear the loss.

"Where property is destroyed the party in whom the title is vested must bear the loss."

Grant *vs.* United States, 7 Wall., 331, 337, citing *McConihe vs. The New York, etc., Railroad Company*, 20 N. Y., 495, 497.

"In *Bishop vs. Minderhaut*, 128 Ala., 162; 29 South., 11; 52 L. R. A., 395; 86 Am. St. Rep., 134, it was held, and it is the general rule on the subject, that when personal property is sold and delivered to a vendee under an agreement that the title thereto is to remain in the vendor until payment of the purchase price, the loss or destruction of the property while in the possession of the vendee, before payment, without his fault, relieves him from the obligation to pay the purchase price, and such loss falls on the vendor. This is upon the principle that the title does not vest in the buyer until performance of the condition, and until it does pass the risk of loss generally remains in the seller. 1 Benj. on Sales, §§ 427, 425, 436, 364."

American Soda Fountain Co. vs. Blue (Ala.), 40 Southern, 218.

In *Marion Mfg. Co. vs. Buchanan*, 8 L. R. A. (N. S.), 590; 99 S. W., 984; 118 Tenn., 238; 12 Ann. Cas., 707, a result seemingly contrary was announced, but the conclusion reached was placed on the ground, "the retention of title in the vendor was a mere security for the payment of the price."

In the case last mentioned, the case of *Planters' Bank vs. Van Dyck*, 4 Heisk. (Tenn.), was cited, in which Judge Turney held: "The stipulation * * * (of retention of title) was nothing more than a lien retained, a provision by way of security."

In *La Valley vs. Ravenna*, 78 Vermont, 152; 6 Ann. Cas., 684; 2 L. R. A. (N. S.), 97; 62 Atl., 47, the purchaser

under a conditional sale contract was held liable for the unpaid purchase price, notwithstanding the accidental destruction of the property. The purchaser "got just what he bargained for—the use, possession, and enjoyment of the property, with the right to acquire the absolute title upon the payment of the stipulated price" (78 Vermont, 156).

In the note, 138 American State Reports, 903, it is said:

"A majority of the courts hold that since the vendee enjoys all the incidents of ownership, the fact that the bare title is reserved by the vendor until the price is fully paid, will not relieve the former of his obligation to pay the price of the goods destroyed while in his possession, even though the destruction was without his fault."

In the same note, 138 American State Reports, 905, it is further stated:

"We incline to the view taken by the minority decisions, not because we sometimes doubt the wisdom of majorities, but because we know that minorities are not always wrong. We have only to consider the rule of conditional sales generally in order to arrive at a logical conclusion whether the majority is in the right, a minority in the wrong, or vice versa, on the subject under consideration. We find in Benjamin on Sales, Bennett's 7th edition, paragraph 328, the following rule: 'Where the buyer is by contract to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer.' It is therefore apparent that what a vendee buys is property, not, solely the title to, or the possession thereof, and if, without his fault, the property is destroyed, there is, in our opinion, an entire failure of consideration."

In *Randle vs. Stone*, 77 Ga., 501, a note, given for the purchase money of an engine and boiler, contained a clause

retaining the title in the seller until the purchase price was paid in full. The property was destroyed by fire in the possession of the purchaser before the maturity of the note. It was held that, as the title remained in the vendors, the loss fell on them. The court said:

"The owner must suffer the loss if there be no fault in the actual possessor, who is a bailee. 1 Benjamin on Sales, section 620; 1 Parsons on Contracts, pp. 526, 533, 537."

Again, it was stated:

"This court has * * * (recognized) the principle that in case of destruction by fire the loss must be met *by him who has the title.*" 77 Georgia, 504.

In *Arthur vs. Blackman*, 63 Fed., 536, machinery was delivered under a contract of conditional sale. The machinery was destroyed by fire without the purchasers' fault, while in their possession, and before the notes were paid for title transferred. Held, that the loss should fall on the seller.

In *Roach vs. Whitfield*, 94 Ark., 448; 127 S. W. Rep., 722, the court ruled:

"The title was retained only for the purpose of security, but for no other purpose. So far as the appellant was concerned, she had done all she could do to pass the title when the goods were shipped to appellee * * *. The title passed immediately to them, the appellees, on payment of the purchase price * * *. Where the title is retained solely for security and passes immediately to the vendee upon the payment of the purchase price money, he in the meantime having the absolute control and dominion over the property, the rule is that the loss falls upon the vendee, and the vendor may recover the purchase price undiminished by such loss."

In *Foley vs. Felratt*, 98 Ala., 176; 13 Southern, 485, goods were destroyed while in transit from the seller to the purchaser. It was held:

"If the sale is completed, and the goods perish, without the fault of the seller, the purchaser is bound to pay the agreed price."

In *Mountain City Mill Company vs. Butler*, 109 Georgia, 469, flour was shipped on a bill of lading to shipper's order. The bill of lading was attached to a draft. While the flour was in the depot awaiting the convenience of the purchaser to take up the draft the flour was destroyed by fire. The court said:

"It appears from the terms of the contract set forth in the petition, that the title to this property never passed from the seller to the purchaser, but was in the former when the property was destroyed."

The court cited *Randle vs. Stone*, 77 Georgia, 501, *supra*, and it was ruled the loss fell on the seller.

In *Glisson vs. Heggie Brothers*, 105 Georgia, 30; 31 Southeastern Reporter, 118, the court said:

"It is a well-settled rule of law that where property is sold with the condition that the title is to remain in the vendor until the purchase price is paid, unless otherwise stipulated, the risk is on the seller, and in case of loss of the property, without fault of the buyer, no action can be maintained for the purchase price."

In 1 Mechem on Sales, sec. 634, it is said:

"The question of the effect of the accidental destruction of the property before it was fully paid for has always given rise to decisions apparently in conflict; the true view would seem to be that the loss follows the title; hence in the case of the conditional contract to sell, where no title passes until payment in full, the loss, unless otherwise provided by the contract, would fall upon the party agreeing to sell; while in the case of a sale upon condition subsequent, the loss would fall upon the purchaser; and so the decisions are, when not complicated by other facts."

In *Swallow vs. Emery*, 111 Mass., 355, 356, it is said (Gray, J., concurring):

"It appears that the plaintiff delivered the horses, wagon and harnesses to Waby to be used, and under a contract of sale, when the stipulated price should be paid. * * * The articles were to remain the property of the plaintiff until the whole amount should be paid * * * the loss of one of the horses by its death without any fault on the part of Waby, was the plaintiff's loss and disabled him from performing the contract on his part."

In *Jacob Strauss Saddlery Company vs. Kingman & Company*, 42 Missouri Appeals, 208, the rule is stated:

"At whose risk were the goods at the time of the fire? * * * The law fixed the risk where the title resided" (page 214).

It thus appears, as the law places the loss where the title resides, the converse of the proposition is also true: the title is where the loss is placed. By contract the loss, if any, was placed on the bankrupts; hence they should be held to have become invested with the title, subject to a lien in favor of the seller to secure the purchase price.

There are authorities, hereinafter noted in the chapter devoted to the interest of a vendee in a conditional-sale contract, which place the loss by fire on the vendee; and also authorities giving him an insurable interest. But all these proceed on the theory that in some degree at least the title to the property has passed to the conditional vendee.

IX.

In the contract it is distinctly provided that the seller "shall have the right to file a (mechanic's) lien for material and labor furnished under this contract, and this stipulation is declared to be notice * * * of the intention to file a lien" (Rec., 14, 15).

It is submitted this provision is:

(a) An election to enforce the purchase price and inconsistent with the theory of a conditional sale;

(b) An admission that the property furnished became a part of the realty, for otherwise it could not be the basis of a mechanic's lien; having become a part of the realty, it could be the basis of a conditional sale.

First, as to the intention to enforce the purchase price by filing a lien therefor.

"There can be no doubt that to claim a lien upon anything is inconsistent with asserting a title to it."

Wm. W. Bierce, Ld., *vs.* Hutchins, 205 U. S., 340, 346.

In the Bierce case it was decided that the mere filing of a lien and the institution of a suit to enforce the lien, followed by a dismissal of the suit before anything had been done in the suit, was not an election of a binding nature: "The case stands on election alone. * * * The effect attributed to the assertion of a lien is attributed to it as a *strictly unilateral act*. * * * The assertion of a lien by one who has title *so long as it is only an assertion and nothing more, is merely a mistake*. * * * The fact that a party, through mistake, attempts to exercise a right to which he is not entitled does not prevent his afterwards exercising one which he had" (205 U. S., 347).

But in the case at bar (Rec., pp. 14, 15) the contract is made to operate *as notice of an intention to file a lien*, and the contract also recognizes the seller is in fact entitled to file a mechanics' lien (Rec., 14, 15).

"The assertion of that lien (a mechanic's lien) treated the property as the property of Belser & Parker (the purchasers). * * * It was inconsistent with the existence in the plaintiffs of a title

to the property. It treated the sale of the property
* * * as unconditional."

Van Winkle *vs.* Crowell, 146 U. S., 42, 51.

In that case effect was given to *Lehman vs. Van Winkle* (Ala.), 8 Southern, 870, 871, in which it is ruled, the suit to enforce the mechanic's lien "in our opinion, was an unequivocal election to treat the property as that of Belser & Parker, subject to a lien, the existence of which was, as we have said, wholly inconsistent with the retention of title in the vendors."

In *McCormick Harvesting Machine Co. vs. Lewis*, 52 Kansas, 358, an action was brought on a promissory note, evidencing a conditional sale, to recover the balance due thereon. Plaintiff had retaken the property. A recovery on the note was authorized, because the parties had undone the conditional sale, the seller having thereafter taken a chattel mortgage from the purchaser. "Their action was wholly inconsistent with ownership in the company (the seller). Lewis (the purchaser) assumed to have title by mortgaging same to the company (the seller), and in applying for and accepting the mortgage, the company recognized such mortgage."

In *Aultman vs. Silba*, 85 Wis., 359, a suit was brought to foreclose a real-estate mortgage securing notes. The defense was, the notes had been given as incident to a conditional sale contract, that the vendor had retaken the machinery sold, and hence that the consideration for the notes had failed. The trial court sustained this defense. "If the premises of the court are right, the conclusion probably follows" (85 Wis., 363). But as a mortgage had been given upon the article claimed to have been conditionally sold, the court said:

"The giving of mortgages upon the machinery and other property to secure the payment of the notes, with stipulations to pay the balance remaining after foreclosure, is utterly inconsistent with the idea of a conditional sale" (85 Wis., 365).

In *American Soda Fountain Co. vs. Blue* (Ala.), 40 Southern, 218, property claimed to be the subject of a conditional sale contract was destroyed by fire before the performance of the condition. Defendant resisted an action on the notes given for the purchase price. *Held*, that, as the seller had taken a lien by way of mortgage on the property sold, the title had passed to the purchaser and the sale become absolute. Affirmed on second appeal, 150 Alabama, 165, 166.

In *Wurmser vs. Sivey*, 52 Mo. App., 424, a seller took a mortgage on the property sold to secure the purchase price. Defendant claimed the sale to be conditional, this in order that the transaction might be brought within the terms of a statute giving a conditional-sale purchaser the right to a return of a part of the purchase price theretofore paid. *Held*, the transaction was one of mortgage. The title passed to the defendant "by the very nature of the transaction. If this were not so, why did defendant execute the mortgage to plaintiff, covering the identical goods?"

General Statutes of Kansas, 1909, section 6244, provides:

"Any person who shall under contract with the owner of any tract or piece of land * * * *furnish material* for the erection, alteration or repair of any building, improvement or structure thereon; or who shall *furnish material* or perform labor in putting up of any fixtures or machinery in, or attachment to, any such building, structure or improvements * * * shall have a lien upon the whole of said piece or tract of land, the building and appurtenances * * * *for the amount due to him for such labor, material, fixtures or machinery.*"

"Under the law, the foundation of the lien is the contract with the owner for labor or material."

Lang vs. Adams, 71 Kansas, 309, 310.

An intention to file a lien is wholly inconsistent with an intention to retain the title.

It is true that it has been ruled that a reservation of title in the manufacturer or vendor does not amount to a waiver of the right to file and enforce a mechanic's lien for material thus furnished,

. *Hooven vs. Featherstone*, 99 Fed., 186, 181, citing *Mfg. Co. vs. Smith*, 40 Fed., 339; *Chicago & A. R. Co. vs. Union Rolling Mill Co.*, 109 U. S., 719.

Warner, etc., Mfg. Co. vs. Capitol Inv. Assn., 127 Mich., 473. 89 Am. St. Rep., 473.

Elwood State Bank vs. Mock, 40 Ind. App., 685, 688.

And for that reason it may be argued the stipulation in the contract under review in the case at bar, giving the right to file a lien, is meaningless, because it is the law which gives the right to file a lien, and that in any event a right to retake the property and the *right* to file a lien may, under the authorities, coexist until one is exercised, but it is clear "the bringing of a suit to recover the purchase price of the machinery from the vendee, and for the foreclosure of his statutory lien is in itself an election to waive the right secured by contract."

Elwood State Bank vs. Mock, 40 Ind. App., 685, 688.

Claiming under a contract, intervener is bound by all the terms and provisions thereof.

Here Baker Ice Machine Company elected to contract for a notice of intention to file a lien (Rec., pp. 14, 15).

"An election to sue for the purchase price operates to vest the complete title in the purchaser" under a contract of conditional sale.

Gaar, Scott & Co. vs. Fleshman, 38 Ind. App., 490, 493.

But to retake the property amounts, in the absence of an agreement to the contrary (and no such agreement is found

in the contract in the case at bar), to a cancellation of the obligation to pay the purchase price. An intention to file a lien can only be predicated of an intention to enforce the purchase price.

"The trial court found that the transactions in question amounted simply to a conditional sale of the machinery, that the title remained in the plaintiff, and that upon retaking the same the consideration for the notes entirely failed. If the premises of the court are right, the conclusion probably follows. *Hine vs. Roberts*, 48 Conn., 267; *Bailey vs. Hervey*, 135 Mass., 172" (*Aultman vs. Silba*, 85 Wis., 359, 363).

"A retaking or recovery of the property on the default of the buyer is a *disaffirmance of the contract*, and the seller cannot thereafter maintain an action to recover the balance due on the purchase price."

35 Cyc., 705.

A conditional-sale contract is one for a sale of the property *when* the purchase price for it shall have been paid.

Loomis vs. Bragg, 50 Conn., 288; 47 Am. Rep., 638.

"The law governing conditional sales does not permit the vendor to retake the chattel, thus rescinding the sale, and then sue for the unpaid purchase money, thus enforcing the contract of sale."

Laclede Power Co. vs. Est. Ennis Sta. Co., 79 Mo. App., 302, 307, citing a large number of authorities.

"The law will not permit a vender of property who retains the legal title in himself to take possession of it upon default of payment, sell or otherwise dispose of it, and then sue the vendee for the balance of the purchase price," citing a large number of authorities.

Turk vs. Carnahan, 25 Ind. App., 125; 81 Am. St. Rep., 85, 88.

"The undisputed facts in this case show that appellees elected to *disaffirm the contract* and took possession of the property described in the note. Having asserted their right to disaffirm the contract, and having taken possession of the property under such disaffirmance, appellees thereby abandoned their right to treat the sale as absolute and sue for the price" (25 Ind. App., 128; 81 Am. St. Rep., 88).

Speaking of a contract held to be one of conditional sale, this court has ruled: "They (the sellers) could not rightfully retake the cattle, while they retained the notes."

Segrist vs. Crabtree, 131 U. S., 287, 292.

In the case of a conditional sale, "the promise of payment and the implied obligation to transfer the title (is) mutual."

Minneapolis Harvester Works vs. Hally, 27 Minn., 495, 498.

"We are confident that it is settled beyond controversy, in nearly all of the courts of this country * * *; and it is equally well settled that, upon the vendee's failure to comply with the conditions as to payment, the vendor may elect to retake the property, or may treat the sale as absolute, and bring an action for the price; but *the assertion of either right is the waiver or abandonment of the other.*"

Keystone Mfg. Co. vs. Cassellius, 74 Minnesota, 115, 117, 118.

"If it be assumed that they (the sellers in a contract claimed to be one of conditional sale) might at their option, either reclaim the goods as their own property, without any obligation to account for their proceeds or value to the plaintiff, or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. * * * Two inconsistent courses being open

to them, they must elect which they would pursue; and electing one, they are debarred from the other."

Bailey *vs.* Hervey, 135 Mass., 172, 174
(HOLMES, J., concurring).

"Vendor (in a conditional-sale contract) cannot both sue for price and retake property."

Note, 6 Am. & Eng. Enc. Law (2d ed.), p. 480, and *cas. cit.*

Holt Mfg. Co. *vs.* Ewing, 109 California, 353, 356.

"If the seller levies an attachment or execution on the property as the property of the buyer, it will be regarded as an election to treat the sale as absolute" (35 Cyc., 673).

In Benjamin on Sales (7th ed.), Bennett's Notes, at page 301, it is said:

"A note given for partial payments could not afterwards be collected by the payee if he had retaken the property for failure of some subsequent payment. The consideration of the note fails * * * The vendor may retake the property in case of default, or sue upon the notes to recover the contract price. He cannot do both."

In 1 Mechem on Sales, section 619, speaking of conditional sales, it is said:

"The price is not ordinarily payable unless the title has passed; hence if the vendor chooses this remedy (that is an action to recover the purchase price) he clearly indicates his election to treat the sale as perfected, and thereby bars either a subsequent rescission of the contract or a reclamation of the property—even though he may not succeed in his endeavor to collect the price."

In the case of a conditional sale, an action to enforce the purchase price "was to admit the title to the property to be in the vendee."

Merchants & Planters Bank *vs.* Thomas, 69 Tex., 237, 238.

"If the seller sues for the price, he cannot thereafter reclaim the goods, although according to the contract the title was to remain in the seller until the price was paid."

Williston on Sales, section 571.

"A continuing liability for the purchase price after the failure to perform the condition, and the vendor has acquired possession of the property, is wholly inconsistent with the character of a conditional sale."

Dowdell vs. Empire Fur. & Lumber Co., 84 Ala., 316, 318.

Hence it follows an intention to file a lien for the purchase price is inconsistent with an intention to retake the property and thus destroy the consideration for the purchase price.

In re Levin, Kronenberg & Co., 220 Fed., 451, 452, it was held by the Circuit Court of Appeals for the Second Circuit (Lacombe, Coxe, and Ward, JJ.):

"The sprinkler company's claim of reclamation is entirely inconsistent with its claim of a mechanics' lien upon the premises. The former of necessity implies title to the fixtures in it, whereas the latter equally implies title to them in Levin, Kronenberg & Co. If the sprinkler company had a choice between these remedies, the election of either would be final. But it could not, without the consent of Levin, Kronenberg & Co., substitute for the claim of title vested in it by the contract of conditional sale a claim of a lien against the premises. If it filed a lien without such consent, it would be making a mistake of law, which would not prevent it from subsequently making a claim of reclamation. *Bierce vs. Hutchins*, 205 U. S., 340, 27 Sup. Ct., 524, 51 L. Ed., 828. This on the ground that it really had no election at all.

"But, of course, the alleged bankrupt or its assignee for benefit of creditors could consent that the sprinkler company should have a mechanics' lien in-

stead of its claim of title, and this was what was actually done. The sprinkler company proved no claim in bankruptcy, but the alleged bankrupt included the company in its schedules as a general creditor for the unpaid balance on the contract. Subsequently its attorney moved that this liability be stricken from the schedule and that the sprinkler company be included as a creditor secured by a mechanics' lien, which was done. Accordingly, the situation of the sprinkler company is that of a mechanics' lien creditor, and its right of reclamation is gone. *Kirk vs. Crystal*, 8 App. Div., 32, 103 N. Y. Supp., 17; *Id.*, 193 N. Y., 622, 86 N. E., 1126."

In *Bensinger Self-Adding Cash Register vs. Cain* (Tex. Civ. App.), 18 S. W. Rep., 136, the court held:

"In *Bank vs. Thomas*, 69 Texas, 237, 6 Southwestern Reporter, 565, it is held if the owner of personal property transfers its possession to one who executes his notes to pay for it an agreed price, at a stipulated time, under a contemporaneous contract, by the terms of which the title is to remain with the vendor until the price is paid, with the right to reclaim possession if the price is not paid at the time agreed on, the original owner, in default of payment, may elect either to enforce payment of the notes or to reclaim possession. The assertion of either right is an abandonment of the other. To assume possession cancels the right to enforce payment of the obligation to pay, and the effort to enforce payment is equivalent to an admission of title in the purchaser."

In 32 L. R. A., 471, there is an extensive note on the subject: "Election of Remedy under Contract." The majority of the cases are to the effect that an election to enforce the obligation to pay created by the contract prevents an enforcement of the contract by a taking of the property therein described.

~~A seller in the case of a conditional sale contract cannot~~

retake the property and then sue to recover the unpaid balance of the purchase price.

Hine vs. Roberts, 48 Conn., 267.

Bailey vs. Hervey, 135 Mass., 172.

Aultman vs. Silba, 85 Wis., 359, 363.

35 Cyc., 705.

Laclede Power Co. vs. Est. Ennis Sta. Co., 79 Mo. App., 302, 307.

Turk vs. Carnahan, 25 Ind. App., 125.

Segrist vs. Crabtree, 131 U. S., 287, 292.

Minneapolis Harvester Works vs. Hally, 27 Minn., 495, 498.

Keystone Mfg. Co. vs. Cassellius, 74 Minn., 115.

6 Am. & Eng. Enc. Law.

Benjamin on Sales.

Holt Mfg. Co. vs. Ewing, 109 California, 353, 356.

In *Richards vs. Schreiber*, 98 Iowa, 422, 67 Northwestern Reporter, 569, it was held that where a conditional vendor brought an action for the recovery of the price of the property added by attachment:

"The suit and proceedings thereunder were unequivocal election by it, the vendor to waive any right it may have had to recover the property as its own and to treat it as sold absolutely to Ehrlich," the conditional vendee" (98 Iowa, 433).

The court said:

"We think it should be given the effect of an election to treat the property as sold absolutely."

In *Smith vs. Barber*, 153 Indiana, 322, 328:

"The contract sued on is one of conditional sale. Under the rule governing such contracts, the appellee, as vendor, having delivered personal property and constructed it upon appellants' premises into a manufacturing plant, with their knowledge

and co-operation, under a contract of sale with appellants, in which it was stipulated that the title to the property should remain in the vendor until fully paid for, and the property and its construction having been conformed to the vendor's contract, upon default by the vendee to pay the purchase price, according to their agreement, the vendor had the right of election to retake the property or to treat the sale as absolute and sue for the price" (citing a number of authorities).

"In his counterclaim, appellee sued for the price of the property sold. This act evidenced his election to treat the sale as absolute.

"As we have seen, appellee (the seller), upon appellants' (the purchasers) default, had a choice of remedies. He might retake his property or treat the sale as complete and sue for the price. But he cannot have both the property and the price. Neither can he treat the sale as complete without abandoning his right of possession. * * *

"The prosecution of his suit for the price to final judgment is conclusive against him. Having elected one remedy, he is debarred from the other."

In *Smith vs. Gilmore*, 7 App. D. C., 192, the action was in replevin by a conditional vendor. The conditional vendee died and the property was sold under an order of the court of probate jurisdiction. The conditional vendor thereupon applied to the court of probate jurisdiction for a payment of the balance due out of the price realized for the sale of the property. The court of probate jurisdiction denied the request. Thereupon the conditional vendor brought an action in replevin against the purchaser of the piano. The court said:

"Shall the proceeding in the Orphans' Court to collect the balance of the purchase money be treated an election to collect a debt only and an abandonment to the claim of title to the piano itself? * * * When the holder and claimant refused to pay for it, the conditional vendor had two legal remedies open to his pursuit. One was to recover the unpaid bal-

ance of the purchase money of the estate of the deceased vendee. The other was to recover the property itself of the defendant. While he might, in strictness of law, under the express terms of the contract, retain the payments that had been made without accounting therefor, and retake the property because he had not parted with the title, he certainly could not reclaim it and recover the balance due. The bringing of the suit to recover this money as due, was necessarily an abandonment of his claim of title. * * * If he reclaims the property, it must be on the ground that he elected to treat the transaction as no sale. If he brought an action for the price, he thereby affirmed the sale. * * * The seller cannot have his goods and the purchase price also. He must relinquish the one right or the other. If he would have his goods, he must declare that he never sold them, in fact, never parted with his title, and thereby relinquish all claim to the purchase money. If he would have payment of the purchase money, he must affirm the sale and waive the conditions upon which the delivery was made."

In *Crompton vs. Beach*, 62 Conn., 25, 38, the court said:

"This is not a question of remedy, but of right. The contract was conditional. The note should be paid or the property might be retaken. There was an option. True, this court has held that such option belonged to the vendor and not to the vendee, the debt was absolute if the vendor elected to treat it as such. The plaintiff, or she as his administratrix, might therefore, upon the vendee's default, demand and enforce either payment or return. If the latter, they by the express terms of the instrument inured to discharge the note. If the former, they actually, though by operation of law, transferred and confirmed the title. Having elected, therefore, to enforce the note, the plaintiff is entitled to all the remedies which the law, or the contract, gives her for that purpose, but not for any other purpose."

In *Tanner vs. Hall*, 89 Ala., 628, it appeared that the notes sued on were given as purchase money for property

sold under an agreement of conditional sale. An action in attachment was instituted against the makers of the notes and levied on the property described in the notes as the property of the makers. The court said:

"The retention of title by the seller is a clause of the contract inserted for his benefit. It is at most a form of security for the payment of the purchase money. It is not absolute ownership; for payment of the debt, or tender within a reasonable time kept good, would divest the seller's title; so far as the rights of the purchasers were concerned, they were the owners of the property subject only to the right and option of the seller to assert his remedy, title and the security it afforded; he alone could assert this, and he had the equal right to waive it, and treat his claim as any ordinary debt of the purchasers. * * * The attachment in Florida and sale under it, were an election to treat the property as belonging to the purchasers, and not to assert that title and lien reserved in the seller."

The case last mentioned was cited with approval in *Montgomery Iron Works vs. Smith*, 98 Ala., 644, 646:

"It manifestly appears that in this attachment proceeding, the plaintiff unequivocally recognized the property as defendant's, and sought to subject it in a manner wholly inconsistent with the retention of title in himself. When he sold the property to defendant he thereby waived any title he might have had in the property and could not afterwards institute this suit, maintainable only on the theory of title in himself."

Fuller vs. Eames, 108 Ala., 464, 466.

In *Bailey vs. Hervey*, 135 Mass., 172, it was said (HOLMES, J., concurring):

"By the terms of the written agreement, the plaintiff was bound at all events to pay to the defendants the full amount at which the goods were valued, and upon such payment the title was to vest in him.
* * * The defendants would have no right to

exact payment in full of the money, and also to reclaim the goods. When the plaintiff discontinued his payments on account, what was the legal position of the defendants? If it be assumed that they could at their option either reclaim the goods as their own property without any obligation to account for their purchases, or value, to the plaintiff; or that they might collect the price in full, it is plain that they were not entitled to do both. They could not treat the transaction as a valid sale and an invalid one at the same time. If they claimed their property, it must be on the ground that they elected to treat the transaction as no sale. If they brought an action for the price, they would thereby affirm it as a sale. Two inconsistent courses being open to them, they must elect which they must pursue; and, electing one, they are debarred from the other. * * * They had thus made a decisive election to treat the transaction as a sale before reclaiming the goods; and, under such an election, the title passed to Bailey."

In *Matteson vs. Equitable Mining & Milling Co.*, 143 Cal., 436, the cases of *Parke & Lacey Company vs. White*, etc., Lbr. Co., 101 Cal., 37, and *Holt Mfg. Co. vs. Ewing*, 109 Cal., 358, were cited:

"It was merely decided in those cases that a vendor in a conditional sale, after electing to sue for the purchase money, and after obtaining a judgment, cannot recover the property also."

In *Holt Mfg. Co. vs. Ewing*, 109 Cal., 353, 356, it is said:

"The so-called lease was in fact a conditional sale, under the terms of which the seller had either one of two remedies for the violation of the contract by the purchaser. It might, upon the default of the purchaser in meeting the stipulated payments, or any of them, have retaken the property or recovered its possession in an action of claim and delivery; or, on the other hand, treated the sale as an absolute one, and brought its action upon the notes to recover the contract price of the property sold. These rem-

edies being inconsistent, the plaintiff could elect which he would pursue, but he could not have both.

"It seems to be the settled law in this State that the vendor under a conditional-sale contract cannot have both the property and the purchase price."

Edmead vs. Anderson, 103 N. Y. Sup., 369-370.

Mechanics' lien:

"Of course, the lien suit and the present reclamation suit are inconsistent proceedings. The former is founded on the assumption of title in the vendee, and the latter on assumption of title in the vendor."

Arctic Ice Mach. Co. vs. Armstrong County Trust Co., 192 Fed., 114 (Gray, Buffington, and Lanning, JJ.).

In *Moline Plow Co. vs. Rodgers*, 53 Kansas, 743, 749, a conditional vendor instituted an action to enforce the sale price. This was held to be an election to pass the title to the vendee.

"Having made its election with a knowledge at least of the more important facts affecting its rights, the plaintiff may not thereafter abandon its first election and choose the opposite remedy. An election, once fairly made by a party having the right to make it, is final and conclusive."

In re Cohn, 18 Am. B. R., 786, 797, it was ruled (Helm, referee):

"While it may be conceded that the sale made by Brand to Cohn on the 9th of April, 1906, of the stock in trade at the store was a conditional sale, nevertheless the circumstances that a mortgage was given on the property to secure the purchase price thereof, is strongly indicative that it was intended as an absolute sale and that Brand did not retain the title to the property or the right of its possession.

"But after the respondent, Louis Brand, brought an action in the State court to recover the price, or a portion of the price, of the property sold to the bankrupt

Cohn, it had the effect of confirming the sale and making it an absolute sale, whatever it might have been in its inception. This course of the respondent Brand precluded him from claiming thereafter that the property, for the purchase price for which he sued, was held upon a conditional sale. He had the right, if it was sold upon a conditional sale, to either recover the property or to sue for the purchase price. But the pursuit of one remedy necessarily excluded the other."

Citing:

Parke & Lacy Co. *vs.* White River Mfg. Co.,
101 Cal., 37, 41.

Holt Mfg. Co. *vs.* Ewing, 109 Cal., 353.

It was competent for the parties as between themselves to agree the machinery in question should remain personalty, or conversely, should become a part of the realty.

In *Eaves vs. Estes*, 10 Kansas, 314, 317, the following was approvingly cited from *Ford vs. Cobb*, 20 N. Y., 348:

"It will readily be conceded that the ordinary distinction between real estate and chattels exists in the nature of the subject, and cannot in general be changed by the convention of the parties. Thus, it would not be competent for parties to create a personal chattel interest in a part of the separate bricks, beams, or materials of which the walls of a house are composed. Rights by way of license might be created in such a subject, but it could not be made alienable as chattels, or subject to the general rules by which the succession of that species of property is regulated. But it is otherwise with things which being originally personal in their nature are attached to the realty in such a manner that they may be detached without being destroyed or materially injured, and without the destruction of, or material injury to, the things real with which they are connected, though their connection with the land or other real estate is such that in the absence of an agreement, or of any special relation between the parties in interest, they would be part of the real estate."

"In the sale of personal property that is to be fixed to realty, the contracting parties at the time of the sale have the power, as between themselves at least to fix the status of such property, and to say whether, when affixed to the realty of the vendee, it shall remain personal property or become a part of the realty (Fortman *vs.* Geopper, 14 Oh. St., 558; 1 Benj. Sales, sec. 425; Tiedeman on Sales, §§ 83, 85)."

Marshall *vs.* Bacheldor, 47 Kansas, 442, 444.

Ford *vs.* Cobb, *supra*, is also quoted in Fortman *vs.* Goeppner, 14 Oh. St., 558, 564, to this effect:

"Whether an agreement, shall preserve the character of personalty, in things so affixed to the freehold, as that, but for such agreement, they would become part of the realty, depends upon their substantial character, and the mode in which they are annexed, *e. g.*, whether they can be removed without serious damage to the freehold, or substantially destroying their own qualities and value."

In Case Mfg. Co. *vs.* Garven, 45 Oh. St., 289, 301, it is said:

"There is no question but that the character of things which would otherwise be fixtures, may be changed to that of personalty by the agreement of the parties, and conversely, so as to be binding upon them."

But the agreement giving the seller the right to file a mechanics' lien conclusively establishes the property did not remain personalty, but became a part of the realty; otherwise it could not be the basis of a mechanics' lien.

In Phelps & Bigelow Windmill Co. *vs.* Baker, 49 Kansas, 434, the furnishing of a windmill was held to be a proper basis for the filing of a mechanic's lien. "Is there any doubt that the mill passed * * * as a part of the realty when the land was conveyed" (49 Kansas, 440).

"In order to establish a mechanic's lien it is usually necessary that the materials furnished or labor per-

formed should have gone into something which has attached to and become a part of the realty and has added substantially to the value thereof."

27 Cyc., 31.

How can property which the vendor is given the right to retake come within this definition? The stipulation in the contract giving the right to file a mechanic's lien is an admission that the material described in the contract is furnished in circumstances entitling the seller to a mechanic's lien.

"Personal property which is so attached to real estate as to become a part of such real estate is usually held to be within the mechanic's lien laws" (27 Cyc., 37).

If machinery "is stationary and firmly attached to the realty as to become a part thereof, it is the subject of a lien, otherwise not" (27 Cyc., 38, 39).

In *Phoenix Iron Works Co. vs. New York Security & Trust Co.*, 83 Fed., 757, the opinion is by Clark, J., Taft and Lurton, JJ., concurring. A contract retaining the title had been made conveying machinery which became a part of a railway company's system: *Held*, the contract created a lien but inferior to the lien of a prior general mortgage. There is a distinction in this respect between "locomotives and cars, and loose property capable of separate ownership and of separate liens" and "rails and other articles which become affixed to, and a part of a railroad, covered by a prior mortgage" (83 Fed., 759).

"Had the property sold * * * been rails * * * or any other material which became affixed to and a part of the principal thing, the result would have been different."

United States vs. New Orleans Railroad, 12 Wall., 362, 365.

Fosdick vs. Schall, 99 U. S., 235, 251.

In *Porter vs. Pittsburg Steel Co.*, 122 U. S., 267, 282, it was claimed that bridges had been furnished to a railroad, under a contract retaining the title. The court said:

"Rails and other articles which become affixed to and a part of a railroad covered by a prior mortgage, will be held by the lien of such mortgage in favor of *bona fide* creditors, as against any contract between the furnisher of the property and the railroad company, containing stipulations like those in the contract in the present case" (122 U. S., 283).

Hence it follows, as it is admitted by the contract between the parties, it is admitted the property furnished became a part of the realty, and hence the basis of a mechanic's lien, it could not be severed from the realty and become as against a trustee in bankruptcy the basis of a conditional contract of sale. The trustee has as to the property in question, "all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon." Bankruptcy Law, 1898, section 47 (a) 2, as amended June 25, 1910.

That machinery cannot at the same time become a part of the realty and be the basis of a contract of conditional sale is demonstrated in *Triumph Electric Co. vs. Patterson*, 211 Fed., 244, an exhaustive review of the authorities.

"The pleadings and proof on the part of the appellant disclose a sale and delivery of personal property to the stone company, the title of which was reserved in the vendor. *Before mechanics' liens upon such property could become effective it was necessary that it should become a part of the real estate which it was designed to improve.*"

Geppelt vs. Middle West Stone Co., 90 Kansas, 539, 545.

"It is clear that the sprinkler system in question, when installed, became a fixture and as such part of the bankrupt's estate as to form and become a por-

tion thereof, notwithstanding the provision in the contract of sale that it should remain the property of the vendors, and retain its character of personality."

In re Williamsburg Knitting Mill Co., 190 Fed., 871 (Waddill, J.).

In *Richardson vs. Koch*, 81 Missouri, 264, it was ruled of a mechanics' lien:

"That while the lien is given for the work, materials, engines, etc., it is not given on the work, materials, or engine, boiler, etc., but 'upon such building or erection or improvement.' The building then is the subject of the lien, and on it only, as an incident of the freehold. * * * No lien can attach upon the building, where none is secured against the real estate on which the building is located. * * * The lien is on the building, and not on the engine and boiler, unless they are part and parcel of the house. * * * To give a lien on the engine, boilers, etc., in this case, they must have been used in the erection of the building, or afterward connected therewith, so as to become a part of the building itself, so as to go and pass with the building as a constituent part thereof. * * * When the absolute owner of land in fee, for the purpose of better using the land, erects upon and affixes to the freehold, certain machinery, such as is in use in making coal, and in mines, it will go to the heirs as real estate. * * * It is the permanent and habitual annexation, and not the manner of fastening, that determines when personal property becomes a part of the realty."

In the case cited, a quotation was made from *White's Appeal*, 10 Pa. St., 252, in which it was held, "that an engine-house, partly of stone and partly of wood, with stone foundation, for a steam engine erected by a tenant for years, for the use of a coal mine, he having the privilege of removing all fixtures, is not the proper object of a mechanics' lien. * * * If there was any doubt on general princi-

ples, that doubt is removed by the contract; for the lessors and lessee agree that all steam engines, fixtures, etc., may be removed and taken away by the lessee. * * * The contract affixes to it the character of personalty."

In *Fairbanks vs. Richardson Drug Co.*, 42 Mo. App., 262, a distinction was made between a sale and "the doing of work and labor and the supplying of materials to a building, which work and labor and materials, when done and supplied, become a permanent part of the building."

In the case cited it was said:

"All the distinctive characteristics of the contract before us make it a contract of sale. * * * This engine, as between the plaintiffs and the landlord, was a mere trade fixture, personal property, which they undoubtedly would have had the right to remove at the expiration of the lease."

In a companion case, *Pike Electric Company vs. Richardson Drug Company*, 42 Mo. App., 272, the distinction was further outlined:

"The contract must then, it seems, be regarded as one in which the sale and delivery of chattels is the principal thing, and the doing of the work necessary to set them up in and attach them to the defendant's building is the auxiliary thing; and this, we think, takes a contract of this kind into the category of contracts of sale" (page 281).

The distinction thus recognized makes it clear that an article cannot at one and the same time be the subject of a contract of conditional sale and be also the basis of a mechanics' lien.

In *Springfield Foundry & Machine Co. vs. Cole*, 130 Mo., 1, 7, it was ruled:

"The machinery, then, being a mere manufacturing fixture, removable at the pleasure of the Davie Mining Company or Cole, did it, by being placed

in the building erected there, become a part of the land, so that a mechanics' lien could attach to it?

"It was ruled that the building 'became no part of the realty * * * but remained personalty, and plaintiff was not entitled to a mechanics' lien' on the land."

In *Progress Press Brick & Machinery Co. vs. Gratiot Brick & Quarry Co.*, 151 Mo., 501, the question was thus stated:

"The intention of the law is to give a lien where the machinery furnished is intended by the owner to become a part of the building, manufactory or plant. * * * The statute intended to secure the person whose labor or materials or machinery goes into the building or erection and enhances the value of the land. * * * Nor can there be a lien where a tenant puts in machinery under a lease which reserves him a right of removal, for in such cases the chattel never becomes part of the realty."

At page 519 it is said:

"The machinery, therefore, became a part of the realty, and the buildings, erections and improvements on the realty became subject to a mechanics' lien for the machinery furnished as the statute provides in such cases."

In *Morgan vs. Arthurs*, 3 Watts (Pa.), 140, it was claimed that:

"A steam engine is a movable matter, and cannot be considered a fixture,"

so as to be the basis of a mechanics' lien. The court ruled the engine to be a fixture; hence the basis of a mechanics' lien.

In *Ores vs. Ogelsby*, 7 Watts (Pa.), 106, it was held, a steam engine, with its fixtures, used to drive a bark mill erected by the owner, is real and not personal property.

In *Winslow vs. Merchants Insurance Co.*, 4 Metc. (Mass.), 306, it was ruled (Shaw, C. J.) :

"The court are of opinion that the steam engine and boilers * * * as between mortgager and mortgagee, are fixtures, or in the nature of fixtures, and constitute a part of the realty. * * * When a building is erected as a mill, and the waterworks and steamworks, which are relied upon to move the mill, are erected at the same time, and the works to be driven by it are essential parts of the mill, adapted to be used in it and with it, though not at the time of the conveyance, attachment or mortgage, attached to the mill, are yet parts of it, and pass with it by a conveyance, mortgage or attachment."

In *Corliss vs. McLagin*, 29 Maine, 115, it was held that if a mortgagor of a mill, after making the mortgage, put into it a shingle machine and apparatus attached to it, it becomes a part of the free-hold and passes to the mortgagee after foreclosure.

In *Bratton vs. Clawson*, 2 Strob. (S. C. Law), 478, it was held :

"A cotton gin in its place, *i. e.*, connected with the running works in the gin-house, is a fixture that passes to the purchaser of the house."

Fixtures.

As bearing upon the question that the stipulation in the contract that the seller shall have the right to file a mechanics' lien is equivalent to an admission that the machinery furnished became a part of the realty of the purchaser, the attention of the court is called to *Hooven, Owens & Rentchler Co. vs. John Featherstone's Sons et al.*, 111 Federal Reporter, 81, 94 :

"The line of demarcation between realty and personalty in cases between landlord and tenant is by no means the same as in cases between vendor and vendee. * * * And this for the very sound reason that

the relation of landlord and tenant is transitory, the use of the property is by one who is to stay for a limited time and many articles are placed upon the realty by the tenant which both parties intend to have removed at the end of the term; while the things placed upon the realty by the vendor * * * are put there by one whose term of occupancy is unlimited, generally with the intention that they shall become a part of the real estate and that they shall be perpetually and habitually used with it. In cases of the latter class, and especially where ponderous machinery, whose weight alone is sufficient to hold it in place, is in question, permanent attachment to the realty is by no means an indispensable attribute of a fixture. The true test is the intent to permanently incorporate the article and habitually use of it as a part of the real estate, and the true rule is that in a controversy between the claimant of a mechanics' lien and the owner of real estate upon which the property of the lienor has been placed, or between vendor and vendee, * * * engines, machinery, houses, buildings and every other thing which is essential to the particular use to which the realty is applied, or between which and the balance of the realty there is a manifest and necessary dependence, or which is intended to be and is permanently and habitually used as a part of the property constituting the real estate of the owner upon which it was placed, becomes a part of that realty, whether it can be removed without physical injury to the realty or not, however slight its physical connection with the real estate, and even when there is no actual fastening of the one to the other (citing a number of authorities). *Under this rule, the engine became a part of the realty of the respondent and that property became subject to the lien for its purchase price.*"

In *Tyson vs. Post*, 108 New York, 217; 2 American State Report, 409:

"By convention, the owner of land may reimpress the character of personalty on chattels which by accession to the land have been fixtures according to the

ordinary rule of law, provided only that they have not been so incorporated as to lose their identity, and the reconversion does not interfere with the rights of creditors."

True, in the contract in issue in the case at bar there is a provision to the effect:

"The said machinery, apparatus, and appurtenances shall not, under any circumstances, be regarded as fixtures to the realty upon which the same shall be placed, until full and final payment thereof has been made" (Rec., p. 14).

But this provision in the contract is directly in the teeth of the further provision:

"This stipulation is hereby declared to be notice
* * * of the intention to file a lien" (Rec., pp. 14 and 15).

In *Lansing Iron & Engine Works vs. Walker*, 91 Michigan, 409; 30 American State Report, 488, a portable saw-mill was sold to the owner of an interest in a farm. It was provided:

"The title and joint possession of the aforesaid machinery shall remain in the above first party (the seller) until the price is paid in full, according to the notes accompanying this contract, when the same shall vest in the party of the second part (the purchaser)."

The property in question was set up on the farm. The farm was conveyed to a subsequent purchaser. The court quoted with approval made a previous case decided by the same court:

"The parties have had title to the machinery distinct from their title to the land, and this fact of itself is conclusive that the former was personalty.
* * * When the ownership of the land is in one person and of the thing affixed to it is in another and

in its nature is capable of separation without injury to the former, the latter cannot, in contemplation of law, become a part of the former, but must necessarily remain distinct property, to be used and dealt with as personal estate only * * * a thing cannot, as to an undivided interest therein, be real estate and as to another undivided interest be personalty. *It must be the one thing or the other.*"

Accordingly it was held the machinery in question did not become a part of the land and did not pass by the deed to the subsequent purchaser. The reasoning of the court in the case cited is conclusive on the proposition that an article cannot be the subject of a conditional sale contract and the basis of a mechanic's lien at the same time. The assertion of a mechanic's lien treats the property as a part of the realty. The conditional sale contract must treat it as personalty.

"These looms, thus affixed, had become and were * * * a permanent and essential part of the woolen factory; * * * they were fixtures."

Murdock *vs.* Harris, 20 Barb. (N. Y.), 407.

Where the owner of the inheritance annexes fixtures thereto for a permanent purpose and for the enjoyment of his estate they become part of the freehold.

Walmsley *vs.* Miene, 97 Eng. Com. Law, 7 C. B. (N. S.), 116 (an extensive discussion of the subject).

"It is an ancient principle of law, that certain things which in their nature are personal property, when attached to the realty, *become part of it as fixtures.*"

Farrar *vs.* Stackpole, 6 Greenl. (Me.), 54; 19 Am. Dec., 201.

"The engine is a fixture *and a part of the freehold.* * * * fixtures like the engine in question pass with the land."

Sparks *vs.* State Bank, 7 Blackf. (Ind.), 469.

In *Hawkins vs. Hersey*, 86 Maine, 394, 396, it is said:

"It is a well recognized rule that when articles of personal property which are specially adapted and designed to be used in connection with the realty and essential to the convenience and profitable enjoyment of the estate, are affixed to it, with an intention to make them a permanent accession to the land, they become a part of the realty though not so fastened as to be incapable of removal without serious injury to themselves or the freehold. * * * So, when machinery is sold and placed in a building for the purpose of making it available as a manufactory and permanently increasing its value for occupation, under agreement between the seller and buyer that the title shall remain in the former until it is wholly paid for, will not bind or affect the mortgage of the realty, without notice, and such machinery will pass to the mortgagee as a part of the realty."

This case expressly recognizes that the property under a conditional sale contract must either be personalty or realty; it cannot be both: if personalty, it is not the subject of a mortgage lien; if realty, it is not the subject of a conditional sale contract.

Jones on Chattel Mortgages (5th ed.), section 132a: "Machinery may, however, remain chattels for all purposes, even though physically attached to the freehold by the owner, *if* the mode of attachment indicates that it is merely to steady them for their more convenient use, and *not* to make them an adjunct to the building or soil. * * * Machinery remains personal property *until it is actually annexed to the realty.*" But to become the basis of a mechanic's lien, property must become a part of the realty, thereby losing its character as personalty.

In *Haven vs. Emery*, 33 N. H., 66, 68, it is said:

"A house built on land of another, or a fence set on his land, with his assent, and under an agreement that the house or fence shall remain the personal property of the party who places it on the land, does

not become annexed, in law, to the land. The agreement of the parties in such cases, supersedes the general rule of the law."

In *San Antonio Brewing Assn. vs. Arctic Ice Machine Manufacturing Co.*, 81 Texas, 99, it is ruled: That—

"Where personal property is sold and the title is reserved in the vendor, as in this case, until the payments are made, and the purchaser, with the consent of the seller, attaches it to the former real property, as between the parties, its character as personal property is not changed. *Harkey vs. Cain*, 69 Tex., 150."

In *Harkey vs. Cain*, 69 Texas, 146, it was ruled:

"When the owner of land attaches personal property to it as a permanent accession to the value of the freehold, it becomes a part of the realty * * * so, if one agree to sell to another personal property and deliver it, retaining the title till the purchase price be paid, and the vendee obtain his consent and move it upon and attach it to the vendee's realty, it will, in our opinion, remain personalty as between the parties to that transaction."

But, as already pointed out, so long as the property in question remains personalty, it cannot be the subject of a mechanic's lien. It can only be the subject of a mechanic's lien by being treated as a part of the realty. Hence, the stipulation in the contract, that the contract is to be regarded as notice of an intention to file a lien, directly negatives the idea of a conditional sale.

In *Jenks vs. Colwell*, 66 Michigan, 420, the subject-matter of controversy was a mill building containing a steam boiler and machinery. The plaintiffs furnished the machinery in question under a contract containing a clause: "It being expressly understood that the title of the same above mentioned articles, machinery, etc., shall not pass out of the said Phenix Iron Works until the full sum hereinafter mentioned shall be paid as herein specified; that the same shall

not become a fixture by being placed in any mill or other building or being annexed in any manner to the realty."

It appeared that the plaintiffs knew the use to which the property was going to be put. The machinery and boiler were placed by the conditional sale purchaser in the mill under his contract with the defendants. The court said:

"Where the purchase is made from the vendee in good faith and without notice, under circumstances in which the original vendor must have known or contemplated that the property would be sold by his vendee, and incorporated into or made a part of the freehold, his rights have been made subservient to those of the innocent purchaser. * * * In this case defendants' contract with Thompson was made before he purchased of plaintiffs. That contract contemplated that the machinery should be wrought into and become a part of the freehold of defendants."

That the claim of a conditional sale, treating the property as personalty, is inconsistent with the claim the property has become a part of the realty (which last named fact is the basis of a mechanics' lien claim) is demonstrated by *In re Sunflower State Ref. Co.*, 195 Fed., 180 (Sanborn, Adams, and Carland, JJ.), where an effort in Kansas to retake machinery under a recorded contract of conditional sale was successful. The defense interposed was the property had ceased to be personalty and had become a part of the realty. The court decided the property remained personalty. If it had become realty, the attempted retaking would have failed.

X.

If the instrument in question is held to be a mortgage, the court is reminded, though dated October 14, 1911, it was not filed for record until May 15, 1912, and the petition in bankruptcy was filed on July 11, 1912, within four months after the recording (Rec., 20, 21). The record shows:

"(11) That on the 15th day of May, 1912, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent, and that by filing the conditional sale contract in the office of the register of deeds of Brown County, Kansas, it would effect a preference to the Baker Ice Company over the other creditors of said firm of Grant Brothers.

"(12) That the firm of Grant Brothers retained possession of said ice plant machinery until the receiver in bankruptcy took possession of the same on July 13th, 1912" (Rec., 21, 22).

The question thus arises, as of what date is the preferential character of the transaction to be determined—as of the date of the execution, October 14, 1911 (more than four months before the bankruptcy), or as of the date of the recording, May 15, 1912 (within four months before the bankruptcy).

In section 3*b* a petition in involuntary bankruptcy is required to be filed "within four months after the commission of the act." Where "by law such recording or registering is required *or permitted*," the four months does not expire "until four months after the date of the recording."

(There is a provision in section 3*b* with respect to cases where possession has been taken; but in the case at bar the vendor never retook possession [Rec., 22].)

In section 60*b*, as amended June 25, 1910, the language is that "if by law recording * * * thereof *is required*," omitting "or permitted" in section 3*a*.

Section 3*a* defines an act of bankruptcy. Section 60*b* defines a voidable preference. Some courts have held that where recording is only "permitted," not "required," a petition in bankruptcy might be filed within four months, but the preference, though an act of bankruptcy, was not voidable by the trustee, because "or permitted" was not included in section 60*b*. In the case at bar this differentiation is unimportant. The petition in bankruptcy was voluntary (Rec., 20, 21), thus precluding any discussion of acts of bankruptcy. The laws of Kansas required the instrument to

be recorded, thus precluding any necessity for the consideration of the words "or permitted."

This phase of the case is discussed in our original brief (pp. 9, 10, 12, 15-22). Note especially the debates in Congress as to the effect of the amendment of June 25, 1910, to section 60*b* (Original Brief, pp. 15-22). The excerpt at page 16 is from the report of the House Committee on Judiciary (61st Cong., House Report No. 511, p. 7) concurred in by the Senate Committee on Judiciary (61st Cong., Senate Report No. 691, p. 8).

In these documents it is expressly stated the amendment of June 25, 1910, "is merely declaratory of the law as it exists today, as laid down in the following cases, to wit: "*Bank vs. Connett*, 142 Fed., 35;" * * * "*McIlvain vs. Hardesty*, 169 Fed., 31" (Original Brief, p. 19). In each of these cases the voidability of the preference was determined as of the date of the recording.

In *First Nat. Bank of Buchanan County vs. Connett* (Mo.), 142 Fed., 33, 35 (November 17, 1905), opinion by Hook, J., Sanborn and Adams, J.J., concurring, the question at issue was stated:

"When the mortgages were executed the mortgagor was insolvent, but the bank to whom they were given did not know it and had no reason to believe he intended to give it a preference. One of them was withheld from the record about ten months, and the other about two months.

"When they were recorded, which was about a month before the petition in bankruptcy was filed, the bank knew the mortgagor was insolvent * * *."

It was held the transaction was determinable as of the date of the recording of the instrument.

"The clear letter and policy of the Missouri courts have often been referred to by the courts of that State. The withholding of a chattel mortgage from record assists the debtor to practice a false pretense. It enables him to maintain a financial standing to which he

is not honestly entitled. That is generally the actuating purpose, and it is invariably the result. It induces creditors to forbear and other persons to extend credit. A plain and inexpensive method is prescribed by which a mortgagee may secure a priority of lien, and the evil results that may follow from ignoring it are obvious. The fiction of relation is generally used to prevent wrong or injustice, but we find no warrant in the decisions of the courts of Missouri for its employment to defeat the evident and wholesome policy of the law. There, possession of the property not being taken, a chattel mortgage seems to speak as of the day it is recorded" (142 Fed., 41).

In a note, 18 L. R. A. (N. S.)³³ it is said:

"The doctrine of the *Connett* case is * * * followed in *Bowler vs. First National Bank* (S. D.), 113 N. W., 618."

In *McElvain vs. Hardesty* (Mo.), 169 Fed., 31 (March 24, 1909), it was held (Adams, J., Sanborn and Riner, JJ., concurring), that where an instrument dated December 9, 1904, was not recorded until later—

"the effect of the transfer to McElvain is to be judged as if made on the 7th of July, 1905, when it was filed for record. If Crawford & Carter (the bankrupts) were then insolvent, and if the effect of the enforcement of the transfer was to enable McElvain to obtain a greater percentage of his debt than any other of their simple contract creditors, the transfer constituted a preference within the meaning of the bankruptcy law."

In *Becker vs. Gill*, 206 Fed., 36, 37, it was said (Sanborn, Hook, and Smith, JJ.) of the *Connett* and *McElvain-Hardesty* cases:

"We are satisfied with those decisions, and therefore will not reconsider them. We think the construction of the State statutes and decisions is sound,

and, in addition, makes for the observance of the letter and spirit of the registry laws and business honesty."

In re Hickerson (Idaho), 162 Fed., 345 (June 19, 1908), opinion by Dietrich, J., a mortgage executed March 22, 1906, was filed for record February 16, 1907. Held, the date of the preference was the date of the recording, this under the amendment of 1903.

This case is cited in the reports of the House and Senate Committees on Judiciary (Original Brief, p. 20).

In *Covington vs. Brigman* (N. C.), 210 Fed., 499 (January 30, 1914), opinion by Connor, J., it is said:

"It is manifest that, at the date of registering the mortgage, the debtors being insolvent, a preference was given defendant. Whether the mortgage is a voidable preference at the suit of the trustee is dependent upon whether defendant, *at the date of its registration*, had reasonable cause to believe that the mortgagors were insolvent. * * * The word 'then,' found in the statute (section 60*b*, as amended June 25, 1910), manifestly refers to the date of registration" (210 Fed., 502, 504, citing *First Nat. Bank vs. Connett*, 142 Fed., 33).

This case was affirmed on appeal, *sub nom.* *Brigman vs. Covington*, 219 Fed., 500 (Pritchard, Knapp, and Woods, JJ.). The *Connett* case (142 Fed., 33), was approvingly quoted and characterized as "an able opinion." The court further said:

"In the second place, we are of the opinion that the amendments of 1903 and 1910 were framed expressly to cover such a case as is here presented" (219 Fed., 502).

In *English vs. Ross* (Pa.), 140 Fed., 630 (September 20, 1905), opinion by Archbald, J., it is said (p. 633):

"The case turns, therefore, on whether the transfer of property affected by the deeds is to be judged, as of

the dates when they were, respectively, executed, or as of June 2, 1903, when they were left for record; the latter only being within the four months' period prior to bankruptcy necessary to make out a preference."

The date of record was held to be the date as of which the validity of the transfer was to be judged. This case was decided in the light of the amendments to the National Bankruptcy Law, adopted in 1903.

In *Rogers vs. Page* (Tenn.), 140 Fed., 596 (November 6, 1905), it was ruled, opinion by Lurton, J., Severens and Richards, JJ., concurring:

"The mere fact that the mortgage of 1897 was not recorded does not, under the law of Tennessee, affect its validity, except as to creditors and purchasers without notice, if it was made for a valuable consideration and in good faith. As between the parties to the instrument, it was, if made and held in good faith, a perfectly valid security (citing authorities). * * * The preference over other creditors in such case was given when the mortgage was executed and delivered."

But afterward, in *Loeser vs. Savings Deposit & Trust Co.* (Ohio), 148 Fed., 975, 977, it was pointed out (Lurton, J., Severens and Cochran, JJ., concurring) that *Rogers vs. Page*, *supra*—

"arose under preferences given before the amendment of February 5, 1903."

The instant case was decided in the light of that amendment and the court agreed with *English vs. Ross and First Nat. Bank vs. Connett*, *supra*.

In *re Shirley* (Ohio), 112 Fed., 301 (December 5, 1901), the opinion is by Day, J., Lurton and Severens, JJ., concurring. A mortgage executed August 7, 1899, remained unrecorded until November 11, 1899. The instrument was held valid as against the trustee in bankruptcy, no creditor having obtained a lien on the property prior to the recording of the mortgage.

"We find a mortgage which, as against the contesting creditors, *had no force and effect until filed with the proper officer.* * * * When the chattel mortgage is filed it becomes such preference *only from the date of filing.* *Until filed it is void as to 'creditors.'*"

In *Carey vs. Donohue* (Ohio), 209 Fed., 328 (December 2, 1913), opinion by Warrington, J., Knappen and Denison, JJ., concurring, it was said of a deed executed more than four months, but registered within four months, prior to bankruptcy:

"The principle is settled in this court that * * * the trustee may avoid the transfer if registered within the four months' period. *Loeser vs. Savings Bank, Deposit & Trust Co.*, 148 Fed., 975; 78 C. C. A., 597; 18 L. R. A. (N. S.), 1233" (209 Fed., 334).

In *re Ball* (Vt.), 123 Fed., 164 (May 29, 1903), opinion by Wheeler, J., it was held that a chattel mortgage containing an after-acquired property clause was—

"valid as to the after-acquired property when followed by possession. * * * The possession, which was long within the four months, was the operative thing that would work a preference. * * * The preference as such was given by the bankrupt when his giving could be and was carried into effect," citing *Wilson vs. Nelson*, 183 U. S., 191.

"The Washington court, in *Watson vs. First National Bank*, 82 Wash., 65, at page 67; 143 Pac., 451 at page 452, says:

"Where the mortgage is executed and delivered, and prior to the time of its being recorded, persons other than the mortgagee become general creditors of the mortgagor, but do not become lien creditors until after the mortgage is filed for record, the rights of the mortgagee are superior to those of such general creditors. The mortgage speaks *as of the date it is placed of record.*"

In *re Bolstad*, 224 Fed., 283, 284 (Neterer, J.).

In *Ragan vs. Donovan* (Ohio), 189 Fed., 138 (March 11, 1911), opinion by Killits, J., deeds executed January 7, 1904, were not filed until January 4, 1909. The petition in bankruptcy was filed May 1, 1909. The court held the preference "should be referred for date to the filing of the deeds."

In *Mattley vs. Geisler* (Neb.), 187 Fed., 970 (April 24, 1911), opinion by Hook, J., Riner and W. H. Munger, JJ., concurring, "a chattel mortgage * * * given eight months before the mortgagor became bankrupt" was not filed until two days before the petition. At the time of the filing, the constituent elements of a voidable preference existed. Held, the mortgage was void as a preference.

In *Williams vs. German-American Trust Co.*, 219 Fed., 507, 511, it was ruled (Carland, T. C. Munger, and Youmans, JJ.):

"The taking possession of the mortgaged property by appellee was under the Colorado statute equivalent to the recording of the mortgage, but the prior record of the mortgage having been rendered invalid by the failure of the appellee to comply with the law, the period of four months within which the trustee could attack the transfer as a preference must be figured from the date of taking possession, April 25, 1913."

Attention is called to the rule in Kansas, which in this case is the *lex loci*; hence the *lex fori*.

In *Cameron, Hull & Co. vs. Marvin*, 26 Kans., 612, 625, the court said:

"Did the mortgages become valid when the plaintiffs took possession of the property under them? We think we must answer this question in the affirmative. * * * Where there is a voluntary delivery of possession of the property by the mortgagor to the mortgagee, under a mortgage, such delivery will render the mortgage valid as to all persons not then having any specific right to or lien upon the property, provided the mortgage was previously valid as

between the parties thereto. * * * Counsel for defendant in error seems to contend that where a chattel mortgage is not recorded immediately after it is executed, and the property is not immediately delivered to the mortgagees, it is absolutely void as to all creditors whose debts have been created subsequent to the execution of the mortgage and prior to its being recorded, and prior to the delivery of the property, without reference to any lien procured upon the property by virtue of attachment, or execution, or otherwise. That is, they claim that such a mortgage is so absolutely void as to general creditors, whose debts have been created after the execution of the mortgage, and before the recording of the same, or before the delivery of the property, that they may obtain a lien upon the property after the mortgage is recorded, and after the property is delivered, by virtue of attachment or other legal process. * * *

But whether the doctrine claimed by counsel is sustained by any authority or not, we do not think it sound. Of course, a chattel mortgage not recorded, of property delivered, is void as against all creditors who have no notice of the mortgage; but they have no right to or interest in any specific property until they have obtained this right, or interest, by some legal process. They have no more right to the property than the mortgagee has, whose mortgage is void. They all have an equal right to the property—that is, they all have a right to procure a lien upon it, or an interest in it, by virtue of legal process, or chattel mortgage, or purchase; and the one who first acts will obtain the prior right in and to the property. * * *

“And if the mortgagee, whose mortgage is not recorded, and who does not have possession of the property, records his mortgage, *with the consent of the mortgagor, or takes possession of the property with the consent of the mortgagor, his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded.* The old mortgage is then given life, and force, and effect by the joint action

of both the parties, *and hence must be held to be valid from that time on, as against all persons*" (BREWER, J., concurring).

In *McVay vs. English*, 30 Kansas, 368, 371, a chattel mortgage executed August 17, 1880, was not filed for record until September 4, 1880. An action in attachment was levied on the mortgaged property on September 6, 1880. The court said of the chattel mortgage:

"Of course, it becomes valid as against creditors * * * *as of the date of depositing the same*, and does not relate back so as to invalidate the interests or rights already obtained by court process, in or to the mortgaged property" (BREWER, J., concurring).

In that case it was ruled that it would be presumed that the mortgagor had given a continuing consent that the mortgage might be filed for record.

In *William B. Grimes D. G. Co. vs. McKee*, 51 Kansas, 704, 706, one Thorne executed a mortgage to McKee on December 4, 1888, filed February 2, 1889. On January 23, 1889, he gave a second chattel mortgage to McKee filed for record February 2, 1889; on February 5, 1889, McKee took possession of the stock. Then Thorne executed a chattel mortgage to the Grimes Company, and this was filed by the institution of an action in attachment by Barton Bros.

"The plaintiffs in error contend that the McKee mortgages were absolutely void, because there was no immediate change of possession of the property, and the mortgages were not at once filed for record. * * * The fact that the chattel mortgage was not immediately recorded by McKee, and that the property was not delivered to him, will not prevent recovery. They were filed for record, and possession of the property was taken under them before the plaintiffs in error obtained their mortgage, or any right, or interest, in the mortgaged property. Pos-

session was taken with the consent of the mortgagor, and under the numerous rulings, the mortgages *then* became valid."

In *American Lead Pencil Co. vs. Champion*, 57 Kans., 352, one Champion executed a chattel mortgage, which was never filed for record. Later he executed another chattel mortgage which was thereafter filed for record.

"The only effect of the failure to file a chattel mortgage for record, is rendered void as against the creditors of the mortgagor * * * *until it is filed for record, or actual possession taken under it.*"

In *Youngberg vs. Walsh*, 72 Kans., 220, 226, it appears that a bill of sale executed June 11, 1902, was not recorded until November 2, 1903. A mortgage executed November 21, 1903, was recorded three days thereafter. In other words, the bill of sale was on record when the mortgage was taken.

"It has been decided by this court that under the section of the statute just quoted (the Kansas statute requiring chattel mortgages to be filed for record) a mortgage, although invalid while withheld from record, becomes valid *whenever recorded*. * * * The rule has become settled in this court that an unrecorded mortgage, although void for some purposes, becomes valid *whenever recorded, and of the same force and effect thereafter as a new mortgage then executed and recorded*" (*Utley vs. Fee*, 33 Kans., 683, 7 Pac., 555, and cases cited *supra*).

In *Dixon vs. Tyree*, 92 Kans., 137, Tyree purchased an automobile from Moomaw and gave a chattel mortgage to secure a portion of the purchase price. The mortgage was withheld from record until April 2, 1912. On March 2, 1912, Dixon loaned Tyree a sum of money and took as security a chattel mortgage on the automobile. The chattel mortgage to Dixon was not filed for record. On April 2,

1912, Moomaw filed his mortgage for record and took possession of the automobile without the mortgagee consenting to his possession. Dixon brought replevin. The court quoted with approval from *Cameron, Hull & Co. vs. Marvin*, 26 Kans., 612, 626, to this effect:

"If a mortgagee, whose mortgage is not recorded and who does not have possession of the property, records his mortgage with the consent of his mortgagor, or takes possession of the property with the consent of the mortgagor, *his mortgage then has the force and effect of a mortgage executed on the day on which it is filed for record*, or on which the property is delivered. It is the same then as though a new mortgage had been executed by the parties and recorded. The old mortgage is then given life and force and effect by the joint action of both the parties; hence must be held to be valid from that time on, as against all persons."

It was accordingly held that the person who took a subsequent mortgage, at a time when the prior mortgage was not of record, was entitled to the possession of the property.

In *Wilson vs. Nelson*, 183 U. S., 191, a power of attorney to confess judgment was executed in 1885, which became the basis of a judgment rendered in 1898. Held, the four months' period within which a petition in involuntary bankruptcy might be filed commenced to run as of the date of the judgment, not from the date of the power of attorney.

Thompson vs. Fairbanks (1904), 196 U. S., 516, was disposed of as involving a question of local law (Vermont), 196 U. S., 523. A mortgage executed four months prior to bankruptcy covered after-acquired property. Possession thereof was taken with knowledge of mortgagor's insolvency within four months of bankruptcy. "The Supreme Court of Vermont has held that such a mortgage gives an existing lien by contract, which may be enforced by the actual taking of possession, and such lien can only be avoided by

an attachment or execution creditor, whose lien actually attaches before the taking of possession by the mortgagee.

* * * A trustee in bankruptcy does not in such circumstances occupy the same position" as a lien creditor.

Humphrey vs. Tatman, 198 U. S., 91, was disposed of as involving a similar question arising under the laws of Massachusetts.

Both of these cases (*Thompson vs. Fairbanks*, and *Humphrey vs. Tatman*) are interestingly reviewed (Dietrich, J., *In re Hickerson*, 162 Fed., 345, 353), and held not to deprive a trustee to attack a mortgage delayed in recording as a voidable preference.

Attention is called to *Loeser vs. Savings Deposit Bank & Trust Co.*, 148 Fed., 975, 978, where Lurton, J. (Severens and Cochran, JJ., concurring), ruled:

"The evil to be connected was that of secret preferences, given by withholding from record instruments which by the whole policy of recording statutes should be recorded. This evil was pointed out by the author of the amendatory act of 1903 and the object of the amendment of 60a was stated to be the remedying of this evil. The law, as it stood, encouraged such secret liens and preferences, for, if they could be concealed for four months, through acts of bankruptcy, they were not voidable by the trustee. If we say that unless the law of the State where the transfer is made makes void all such transfers as to all the world, that it is not a law that 'requires' recording, the evil will continue and judges will continue to bewail the iniquity of a law which makes a secret transfer an act of bankruptcy and yet holds the preference valid against the bankrupt's estate because made more than four months before stating bankrupt proceedings against the maker."

"The contention that although possession under the bill of sale was taken within four months before the filing of the petition in bankruptcy, yet as it was executed more than four months prior thereto, this did not make the bill of sale void as a preference,

is untenable. A correct interpretation of paragraphs A and B of section 3 and of paragraph B of section 60 of the bankrupt act (which renders void any transfer which the transferee may have had reasonable cause to believe was intended to be a preference if given within four months of the filing of the petition) discloses that the four months does not begin to run until the creditors have in some form received actual or constructive notice of the transfer [*Landis vs. McDonald*, 80 Mo. App., 348; *In re Klingman*, 101 Fed., 691; *Babbitt vs. Kelly*, 96 Mo. App., l. c., 535]. So that the preference was made within the four months. To hold otherwise would enable a creditor to obtain the execution of an instrument whereby he would be enabled to secure a preference and then, merely by keeping it secret, evade or set aside the bankrupt law."

Gill vs. Safe Co., 170 Mo. App., 478, 486.

"In my judgment, it was the purpose of this enactment to declare generally that, with respect to acts of bankruptcy consisting of making transfers of property when insolvent with intent to give a preference, the act is to be held to have been committed when the transfer is made effectual as against other creditors by recording or registering the instrument of transfer, or by the beneficiary taking actual and open possession of the property, or by otherwise giving actual notice of the transfer to creditors. In other words, the intent of this section is to declare that, as against creditors of an insolvent, the limitation of time for invoking relief against a preference does not begin to run until in some form they have received actual or constructive notice of the transfer to the preferred creditor; and this intent is reached by the declaration that in such cases the transfer constituting the act of bankruptcy shall be held to date from the time the instrument of transfer is recorded, or the possession is taken, or notice is otherwise brought home to the creditors of the bankrupt."

In re Klingaman, 4 Am. B. R., 254, 258, 259
(*Shiras*, District Judge).

In *Studebaker Bros. Mfg. Co. vs. Elsey-Hemphill Carriage Co.*, 152 Mo. App., 401, the action was in replevin. Pending the suit, defendant was adjudicated bankrupt.

"The sale of August 20, 1908, did not take effect as against creditors until the replevin suit was brought, for the reason possession was not taken. And the conditional contract of May 4, 1909, did not take effect because the contract was not recorded. * * * While one of the contracts in question was made on August 20, 1908, and the other on May 4, 1909, yet in determining the question of preference, we must take the situation as it existed when the appellant undertook to complete the transfer by taking possession of the property at the institution of this suit. At that time the corporation defendant was hopelessly insolvent, and the dealings of appellant with it from August 20, 1908, shows appellant must have been apprised of that fact. These things being true, to permit the appellant to hold the property under the evidence in this case, would be a violation of the provisions of the bankruptcy act, both in letter and in spirit."

In *Dobyns vs. Meyer*, 95 Mo., 132, 6 Am. St. Rep., 32, it is held, where possession was taken under a chattel mortgage previously void: "* * * it would seem that if the objectionable parol agreement was abrogated before the rights of creditors attached, the deed of trust ought to be held valid *from that time on*, even as to creditors."

In 2 *Cobbey on Chat. Mortg.*, sec. 794, it is said, of taking a mortgage which has become void for want of possession or recording, and of thereafter taking possession under the mortgage: "The two transactions are independent."

In *Babbitt vs. Kelley*, 96 Mo. App., 529, 535, it is said:

"The crucial question in the case is, when was the preference given? Was it when the mortgage was executed, and therefore more than four months before the filing of the petition in bankruptcy against Weiler, or when the mortgage was put on record, and

therefore within four months of the filing of the petition? If we had any doubt about this question, we should feel bound to accept the answer the Federal courts have made. Their decisions settle the construction to be given to the bankrupt law and there has been a direct adjudication of the point, holding that the filing for record of a chattel mortgage, or other instrument which is subject of record, is the date from which runs the four months' limitation of the right of a trustee to proceed for an annulment of a preference (*In re Klingman*, 101 Fed. Rep., 691), and this ruling was followed by the Kansas City Court of Appeals in *Landis vs. McDonald*, 88 Mo. App., 335.

"The reasons which induced the adoption of that construction of the bankrupt act of 1898 are clearly explained in the opinions in those cases, to which we will simply refer instead of treating the subject at length."

"Until placed in the proper office, a mortgage of chattels, in our State, would be void. * * * But when filed, the instrument becomes valid and effective against all men, except those whose rights have * * * previously attached."

Wilson vs. Leslie, 20 Ohio, 161, 166.

In *Forrester vs. Kearney Natl. Bank*, 49 Nebr., 655, 658, 659, the Kansas cases are extensively quoted and followed to the effect, the mortgage "becomes valid as to creditors as of the date of the filing of the same."

In *Mathews vs. Hardt*, 80 N. Y. Supp 462, 469, the court ruled:

"The trend of the decisions in the United States Supreme Court under the recent bankruptcy act upon the subject of the date of the transfer, is in support of the view that, with respect to an instrument of transfer, it is the time when such instrument is recorded, or when possession is taken or notice is otherwise brought home to the creditors of the bankrupt that is controlling. * * *

"In the case at bar, the effect and result of the pos-

session which the defendants took of the property of the corporation within the four months, were to enable them to obtain a greater percentage of their debt, and they had sufficient cause for believing that by taking possession they would obtain a preference.
* * *

"If the bankruptcy act is susceptible of the construction which under the decisions has been given to it, that a transfer is to be regarded as of the date when possession is taken, then, though the taking of possession was merely as in this case, to effectuate an agreement made in good faith and many months before the prohibited time for giving a preference, the transfer, if the creditor has reasonable cause to believe when such possession is taken that a preference was intended, is nevertheless one which under the act is voidable so that the trustee may maintain an action to recover the property or its proceeds."

In *Frank vs. Miner*, 50 Ill., 444, a senior and junior mortgage in point of date were each held invalid because not recorded. Held, "if the junior mortgagee first obtains the possession, he will hold it under his mortgage."

"Now whether the plaintiffs could or could not have originally enforced their mortgage, *this delivery* of the goods entitled the plaintiffs" to them.

Brown vs. Platt, 8 Bosw. (21 N. Y. Superior Ct.), 324, 331.

In *Chapman vs. Weimer*, 4 Oh. St., 481, the syllabi read:

"A chattel mortgage, purporting to create a lien on the stock in a grocery, and also on such as should be subsequently acquired by the mortgagor, creates no lien on the subsequently acquired property.

"When such mortgage authorizes the mortgagee to take possession of the property secured and attempted to be secured, it is a continuing executory contract; and when the mortgagor acquires such property after the execution of the mortgage, and actually delivers same to the mortgagee, the latter *thereby*

acquires a valid lien on such subsequently acquired property.

"The debtor in this case could, if acting in good faith, have turned over the property to the creditor as security for the debt, and authorized him to sell it, and apply the proceeds to the debt, if no previous mortgage had been made; and the fact that a mortgage void as to creditors has been previously made did not disable the mortgagor in this respect. *Under this delivery and authority to plaintiff*, it was entitled to hold the property."

First Nat. Bk. *vs.* Anderson, 24 Minn., 435, 436, 437.

In Long *vs.* Farmers' State Bank, 147 Fed., 360, 361 (Sanborn, Vandevanter, and Philips, JJ.), it is ruled (syllabus, p. 361):

"*Held*, that where there had been no effective transfer of certain insurance money to a bankrupt's creditors until the money was turned over by the bankrupt to the creditor, which was within four months prior to the filing of a bankruptcy petition, the amount so paid constituted a voidable preference."

The following cases are cited approvingly:

Wilson *vs.* Nelson, 183 U. S., 191; 22 Sup. Ct., 74; 46 L. Ed., 147.

In re Klingman (D. C.), 101 Fed., 691.

Johnson *vs.* Huff, etc., Company, 133 Fed., 704; 66 C. C. A., 534.

English *vs.* Ross (D. C.), 140 Fed., 630, 636, 637.

Matthews *vs.* Hardt (Sup.), 80 N. Y. Supp., 462, 469.

In Page *vs.* Rogers, 211 U. S., 575, the syllabus reads:

"A deed unrecorded and placed in escrow more than four months before bankruptcy within that period held, under the circumstances of this case, to be a preferential payment within the meaning of the bankruptcy law."

There are cases apparently to the contrary remaining to be noted.

Bradley, Clark & Co. vs. Benson, 93 Minn., 91; 100 N. W., 670, decided in 1904, with respect to a transaction occurring in 1902, prior to the amendments of 1903 and 1910, to section 60. We are now discussing the case at bar in the light of our contention, the instrument in controversy is a chattel mortgage. The case cited was distinguished from chattel mortgage cases. Of chattel mortgages it was said:

"They are treated as transfers by the bankrupt to the mortgagee, as of the date of filing in the proper office. But it occurs to us that the reasoning of these cases cannot be applied to conditional sale contracts like that here under consideration" (93 Minn., 95).

"That provision of the bankrupt act declaring that, where a preference consists in a transfer, the period of four months shall not expire until four months after the date of recording or registering the same, refers to transfers originally intended as preferences, or which, at the time of their execution, constituted such as a matter of law. The transaction here involved was not for preferential purposes, nor did it, at its inception, constitute a preference, and consequently the provision of the act referred to can have no application" (93 Minn., 97).

In other words, the delayed recording of a conditional-sale contract is not a preferential transfer.

Claridge vs. Evans, 118 N. W., 198, is especially mentioned in the reports of the House and Senate Committee on Jurisprudence (Original Brief, p. 20) as a case desired to be overruled by the amendment thereafter approved June 25, 1910. [In *Knapp vs. Milwaukee Trust Co.*, 216 U. S., 545, also reported 157 Fed., 106; 162 Fed., 675, a chattel mortgage executed in Wisconsin was held fraudulent as against a trustee in bankruptcy. The mortgage was executed prior to 1907 (157 Fed., 106)]. But the case cited involved, as to the question now at issue, a conveyance of

real property by way of mortgage. "In Wisconsin * * * a real-estate mortgage, given in good faith, is valid as to all the world, except subsequent purchasers in good faith, though never recorded."

The distinction thus noted between conveyances of realty and of personalty obtains in other jurisdictions. A Missouri case should be noted.

In *Pew vs. Price*, 251 Mo., 614, a trustee in bankruptcy attempted to set aside a conveyance of real estate. A father had conveyed land to a son under a deed not recorded. The son reconveyed by a deed not recorded. The son was adjudged bankrupt.

"It is not essential to the conveyance of real estate between parties, that the instrument of transfer should be either registered or recorded. Here the deed from the son to the father was delivered more than four months before the bankruptcy proceeding was begun, and the possession of the land followed the deed. The grantee was thereupon invested with full title as against his son" (251 Mo., 620, 621).

The court referred to *Sturdivant Bank vs. Schade*, 195 Fed., 188 (p. 621), and continued:

"Our statutes as to the recording of mortgages of personal property, which are different in terms and legal effect from the statutes governing the conveyances of land. [*Harrison vs. South Carthage Min. Co.*, 95 Mo. App. 80; R. S. 1909, sec. 2861.] In the latter case, as has been seen, the grantee whose deed is not recorded, takes the title as against prior or subsequent creditors of the grantor who do not procure a sale of the land by legal process before the recording of the deed. In the former case (chattel mortgages, etc.), the instrument is, if unrecorded, invalid as to subsequent creditors where possession of the property is not taken before such creditors fix a lien thereon" [*Landis vs. McDonald*, 88 Mo. App., 335].

251 Mo. Rep., 623.

The same distinction prevails in Kansas:

"The failure to record a real-estate mortgage can be taken advantage of only by one person who has been thereby misled—a purchaser in good faith, for value and without notice. But an unrecorded chattel mortgage, although given in the best of faith, may be defeated by a creditor, even although he had actual knowledge of it."

Moffat *vs.* Beeler, 91 Kansas, 209, 214, 215.

In view of the distinction thus taken by the Supreme Court of Wisconsin, of Missouri, and of Kansas between statute governing the recording of conveyances of realty and of personalty, and of the fact that *Sturdivant Bank vs. Schade*, 195 Fed., 188, involved a real-estate mortgage in Missouri, it is interesting to note in *Big Four Impl. Co. vs. Wright*, 207 Fed., 535, 537 (which is the basis of the opinion in the case at bar, 209 Fed., 603, 604, 605), *Sturdivant Bank vs. Schade*, involving a real-estate mortgage in Missouri, is cited as authoritative in a case in Kansas involving the non-recording of an instrument affecting the title to personalty.

Christ vs. Zehner, 212 Pa. St., 188, 192, contents itself with citing authorities arising under the bankruptcy act of 1867, notwithstanding it was pointed out in *Wilson vs. Nelson*, 183 U. S., 191, the bankruptcy act of 1898 is not a replica of the act of 1867.

In re Hunt, 139 Fed., 283, is an interesting opinion by Judge Ray, interpreting the amendment of February 5, 1903; case decided July 22, 1905. Judge Ray held in that case the recording of the instrument attacked as voidable was merely "permitted," not "required." The case at bar is different.

In *Godwin vs. Murchison Nat'l Bank*, 145 N. C., 320, 330, the court was careful to say:

"This case presents no executory agreement to make a pledge of personal property as security for a past indebtedness, nor is it an executory agreement

to give a chattel mortgage or other lien which requires registration, either by State law or the bankruptcy act and its amendments."

But there are cases to the contrary. See especially:

Long vs. Farmers State Bank, 9 L. R. A. (N. S.), 585; 147 Fed., 360 (Sanborn, Van Devanter, and Philips, J.).

Johnston vs. Huff, A. & M. Co., 133 Fed., 704.

In re W. W. Mills Co., 162 Fed., 42.

Vitzthum vs. Large, 162 Fed., 685.

Torrance vs. Winfield Nat. Bank, 63 Kansas, 177.

First Nat. Bank vs. Johnson, 68 Nebr., 641.

The foregoing cases are collected in a note, 17 L. R. A. (N. S.), 935.

Godwin vs. Murchison Nat'l Bank is also reported, 17 L. R. A. (N. S.), 935. In a note the question is stated:

"The second question is whether the date of the executory agreement, or the date of the actual transfer, should be considered in determining whether the alleged preferential transaction falls within the period of voidability established by the bankruptcy act."

The following authorities are cited as fixing the date at the actual transfer:

Pollock vs. Jones, 124 Fed., 163.

Morgan vs. First Nat. Bank, 145 Fed., 406.

In re Dismal Swamp Contr. Co., 135 Fed., 415, the syllabus reads:

"A parol agreement by a borrower, when the loan was made, to give security upon the property which was to be purchased with the borrowed money, does not render valid a mortgage given pursuant thereto within four months prior to the borrower's bankruptcy, and when he was insolvent, which constitutes a voidable preference under bankr. act July 1, 1898."

In re Great Western Mfg. Co., 152 Fed., 123, 127, it was ruled (Sanborn, Hook, and Adams, JJ.):

"An agreement to mortgage or to transfer is not a mortgage or a transfer. The title remains in the owner unincumbered by the mortgage until the mortgage or transfer is effected. When the agreement is made before, and the mortgage or transfer within, the four months, the title stands unincumbered by the latter at the commencement of the four months, and the proceeds of that title are pledged under the bankruptcy law for the benefit of all the creditors pro rata. Any subsequent mortgage or transfer withdraws that title or a portion of its value from these creditors and a just and fair interpretation and execution of the act demands that such a mortgage or transfer should be adjudged voidable if it is otherwise so, and that the mortgagee or transferee should be remitted to his original agreement. In this way the property at the commencement of the four months and its value may be preserved for the general creditors and the mortgagee or transferee may retain every lawful advantage his earlier contract confers upon him. Any other course of decision opens a new and enticing way to secure preferences, nullifies every provision of the law to prevent them, and invites fraud and perjury. Hold that transfers within four months in performance of agreements to make them before that time do not constitute voidable preferences, and honest debtors would agree with their favored creditors before the four months that they would subsequently secure them by mortgages or transfers of their property, and just before the petitions in bankruptcy were filed, they would perform their agreements. Dishonest men who made no such contracts might falsely testify that they had done so and thus by fraud and perjury sustain preferential transfers and mortgages made within the four months to relatives or friends. The great body of the creditors would be left without share in the property of their debtor and without remedy, and a law conceived and enacted to secure a fair and equal distribution of the property of debtors among their creditors would fail to ac-

comply one of its chief objects. This court will hesitate long before it approves a rule so fatal to the most salutary provision of the bankruptcy law, and our conclusion is:

"A mortgage or transfer of his property by an insolvent debtor within four months of the filing of a petition in bankruptcy against him, which otherwise constitutes a voidable preference, is not deprived of that character or made valid by the fact that it was executed in performance of a contract to do so made more than four months before the filing of the petition."

The following cases rely on the decision just quoted as authoritative:

In re Smith, 176 Fed., 426.

Tilt vs. Citizens Trust Co., 191 Fed., 441.

Roy vs. Salisbury, 134 N. Y. Supp., 733.

Zartman vs. First National Bank, 189 N. Y., 267, is reported on intermediate appeal, 109 App. Div., 406. The mortgage there in question was executed December 1, 1894. An additional mortgage was executed in 1899. The bankruptcy occurred in 1902. The syllabus (189 N. Y., 267) reads:

"A mortgage given by a manufacturing corporation upon all its property, real and personal, to secure its negotiable bonds, with the right of possession and enjoyment in the mortgagor for its own use and benefit until default, although it contains a clause purporting in terms to cover after-acquired personal property, is not good as against a trustee in bankruptcy, as to shifting stock and material on hand when possession was taken by the mortgagee pursuant to the provision of the mortgage; one day after default in the payment of interest and three days before the commencement of bankruptcy proceedings against the mortgagor."

Cited in *Sexton vs. Kessler*, 225 U. S., 90, 98.

In *Sexton vs. Kessler*, 225 U. S., 90, 96, the petition in bankruptcy was filed November 8, 1907. "A trustee in bankruptcy does not stand like an attaching creditor" (p. 97). The transaction "purported not to promise but to transfer; and the subject-matter was not goods and chattels in the sense of the New York mortgage law as we understand that law to be interpreted by the New York courts." Hence, the agreement to deliver made before the four months and not executed prior to bankruptcy was enforced.

In *Denprey vs. Watson*, 216 Fed., 483, 489, it is said: "The date of the mortgage is February 16, 1909; the date of its record August 16, 1910." The amendment of June 25, 1910, was held not to apply to the case, being denied a retroactive effect.

John Deere Plow Co. vs. Edgar Farmer Store Co., 154 Wis., 490, is placed on the ground that the delayed recording of a conditional-sale contract cannot operate as a preferential transfer.

In re Boyd (N. Y.), 213 Fed., 774 (April 28, 1914), opinion by Lacombe, J., Coxe and Ward, JJ., concurring, dealt with a mortgage executed prior to June 25, 1910. It was held that in New York, as to general creditors (as distinguished from lien creditors) existing at the date of a chattel mortgage, the mortgage was not required, but only permitted, to be recorded. Hence, in considering the mortgage as a voidable preference, the four months began to run from the date of the mortgage. The authorities in accord and in conflict are collected.

In the sixth circuit it has already been pointed out, *Denprey vs. Watson*, 216 Fed., 483, involved a real-estate mortgage executed in Kentucky before June 25, 1910.

In re Sam Z. Lorch & Co. (Ky.), 199 Fed., 944 (November 6, 1912), opinion by Evans, J., it was held, quoting the amendment of June 25, 1910:

"We shall assume that the trustee, as expressly provided in the section, has, if he asserts it, the same

right that a creditor holding a lien by legal or equitable proceedings would have to the bankrupt's property."

In that case the mortgage in question was executed in January, 1912, but not recorded until April 15, 1912, three days before the filing of the petition in bankruptcy. It was held the trustee was not entitled to avoid the transfer "unless *either* when it was made * * * or *when it was recorded*," the constituent elements of a voidable preferential transfer existed.

Debus vs. Yates, 193 Fed., 427, arose in Kentucky and involved a conveyance of real estate dated July 28, 1906, and not recorded until October 29, 1906. Judge Cochran distinctly held that the amendment of 1910 "eliminates from transfer preferences any subjective element, and makes them, where recordable and recorded, speak as of the date of recordation."

In re Klein, 197 Fed., 241, arose under the law as it stood prior to June 25, 1910. Section 60*b* was so amended June 25, 1910, "* * * as to eliminate from preferential transfers the intent of the debtor and make them, when recordable and recorded, speak as of the date of recording" (p. 251).

In the Seventh Circuit.

In re Sturtevant (Ill.), 188 Fed., 196 (April 11, 1911), opinion by Kohlsaat, J., Grosscup and Baker, JJ., concurring, a chattel mortgage dated April 30, 1907, filed for record October 5, 1909, fifteen days prior to the filing of the petition in bankruptcy, was held valid as against a trustee in bankruptcy. The court cited *Eppstein vs. Wilson*, 149 Fed., 197; *Meyer Bros. Drug Co. vs. Pipkin*, 136 Fed., 396, and *In re Doran*, 154 Fed., 467, in support of the ruling made. It declined to follow the *Connett* case or the *Loeser* case.

Eighth Circuit.

In re Jackson Brick & Tile Co., 189 Fed., 636, is reported on appeal, *sub nom.* Sturdivant Brick Co. *vs.* Schade, 195 Fed., 188, and involves a mortgage on real estate heretofore distinguished from mortgages on personalty.

In Big Four Impl. Co. *vs.* Wright, 207 Fed., 535, 537, it is ruled:

"The statute (of Kansas) requiring the filing of chattel mortgages is in this respect the same as that requiring the filing of conditional-sale contracts, and the same rule must apply to the latter" (207 Fed., 537).

(Oddly enough in the same case the court observed: "The statutes of Kansas recognize the difference * * * by providing separate and different provisions for filing" [207 Fed., 539].)

Then the Big Four Impl. Co. case (arising in Kansas) was "distinguished therefore from *Re* Wade (D. C.), 185 Fed., 664, and First National Bank *vs.* Connett, 142 Fed., 33; 73 C. C. A., 219; 5 L. R. A. (N. S.), 148, both of which arose in Missouri" (207 Fed., 537).

It is true the Missouri statute requiring chattel mortgages to be recorded makes a non-recorded chattel mortgage void "against any other person than the parties thereto" (R. S. Mo., 1909, sec. 2861).

"This statute is unlike that of many of the States * * * in that it discards the use of the word creditors."

Landis *vs.* McDonald, 88 Mo. App. 339, 339.

"The sweeping character of its provisions at once attracts attention" (142 Fed., 33).

It is also true that the Missouri statute makes an unrecorded conditional-sale contract void as against "creditors" (R. S. Mo., 1909, sec. 2889).

But in *McElvain vs. Hardesty*, 169 Fed., 31, 34, a Missouri case, it was ruled (Sanborn, Adams, and Riner, JJ.):

"Whether this agreement * * * be a chattel mortgage or a conditional sale * * * we deem it unnecessary to decide. It was clearly one or the other, and in either case the law of Missouri made it invalid against creditors of the mortgagors or vendors (should be vendees), until recorded or filed."

In *Becker vs. Gill*, 206 Fed., 36, 37, it is ruled:

"In *First National Bank vs. Connett*, 73 C. C. A., 219; 142 Fed., 33; 5 L. R. A. (N. S.), 148, we held that in Missouri the lien of a chattel mortgage does not come into existence until the instrument is recorded or possession taken under it. * * * In *McElvain vs. Hardesty*, 169 Fed., 31; 94 C. C. A., 399, the above rule was held applicable to contracts of conditional sale in that State. We are satisfied with those decisions, and therefore will not reconsider them."

Having discarded two Missouri chattel mortgage cases decided by it, the Court of Appeals then cited *Sturdivant Bank vs. Schade*, 195 Fed., 188, a Missouri real-estate case, wholly overlooking the distinction hereinbefore made between mortgages on personalty and on realty in Missouri. (See *Pew vs. Price*, 251 Mo., 614, 623.)

In the *Big Four Implement* case the court cites *Rock Island Plow Co. vs. Reardon*, 222 U. S., 354. That case arose prior to June 25, 1910.

"The contract was not filed, yet the vendor had taken possession of the property covered by it before the bankruptcy. It appeared, however, in that case that, prior to that possession by the vendor, another creditor had secured a lien by execution, which lien was preserved by the trustee for the benefit of the creditors" (207 Fed., 537).

Such liens were held "paramount to the rights of the vendor" (222 U. S., 346).

But what comes of the right of a "creditor holding a lien by legal proceedings" given a trustee by the amendment of June 25, 1910, to section 47*a*, sub. 2?

But in *Williams vs. German-American Trust Co.* (Carland, T. C. Munger, and Youmans, JJ.), 219 Fed., 507, a mortgage executed September 18, 1911, filed for record September 18, 1911, was followed by possession taken April 25, 1913, and a petition in bankruptcy May 20, 1913. As in the Reardon case, possession was taken prior to the bankruptcy. Unlike the Reardon case, no creditor had acquired a lien at the date of the possession.

The statutes of Colorado with respect to the mortgage in question (it being given to secure a sum in excess of \$2,500 (219 Fed., 510) required the annual filing of a sworn statement in a prescribed form. The sworn statement was not filed.

"We think that the delay in the case at bar to file the sworn statement, as required by law, was so unreasonable that the court must declare as a matter of law, that the record of the mortgage ceased to have any force or validity.

"The taking possession of the mortgaged property by appellee, was under the Colorado statute, equivalent to the recording of the mortgage" (p. 511).

It appearing it was alleged possession was taken when the mortgagor to the knowledge of the mortgagee was insolvent, a recoverable preference was held to have been pleaded in the bill.

In the case now under review (207 Fed., 537) two cases are cited from the fifth circuit, *Keeble vs. John Deere Plow Co.*, 190 Fed., 1019, and *In re Jacobson & Perrill*, 200 Fed., 812.

Taking up the fifth circuit we find *Little vs. Hardware Co.*, 133 Fed., 874, 878. In that case "the transfer in ques-

tion * * * is not one 'required by law to be recorded' " (133 Fed., 878).

Then came Meyer Bros. Drug Co. *vs.* Pipkin, 136 Fed., 396, in which it was held that in Texas "an unrecorded chattel mortgage shall be void only as against lien creditors." As the trustee in bankruptcy, in the then state of the law, was not "a lien creditor," the mortgage was held valid, "whether the said mortgage was recorded or not" (136 Fed., 399).

The opinion in Keeble *vs.* John Deere Plow Co., 190 Fed., 1019, is short:

"The conditional sale was recorded before the petition in bankruptcy was filed, and therefore is prior in time to any lien the trustee may have growing out of the adjudication in bankruptcy."

In re Jacobson & Perrill, 200 Fed., 812, 813, Judge Newman sets out the opinion of Judge Meek, in the District Court, in the case reported as Keeble *vs.* John Deere Plow Co., 190 Fed., 1019.

No question of a preferential nature arose in the Keeble case. No contention was there made that the vendee to the knowledge of the vendor was insolvent when the contract was filed. No claim arose of a creditor who became such after the contract was executed and prior to its recording.

In re Jacobson & Perrill, 200 Fed., 812, 815, Judge Newman refers to Meyer Bros. Drug Co. *vs.* Pipkin, *supra*, and recognizes as in conflict therewith—

Bowler *vs.* First National Bank, 21 S. D., 449; 113 N. W., 618; 130 Am. St. Rep., 725.

First National Bank *vs.* Connett, 142 Fed., 33; 73

C. C. A., 219; 5 L. R. A. (N. S.), 148.

Loeser *vs.* Savings Deposit Bank, 148 Fed., 975;

78 C. C. A., 597; 18 L. R. A. (N. S.), 1233.

The Bowler case declined to follow Meyer Bros. Dr. Co. *vs.* Pipkin and did follow First Nat'l Bank *vs.* Connett.

In the Connett case the court declined to follow Meyer Bros. Drug Co. *vs.* Pipkin, and said if the rule in that case was correct "we fail to see Congress has adopted anything by the amendment" of 1903.

The annotator (5 L. R. A., N. S., 149) recognizes the Connett case and the Meyer Bros. Drug Co. case are in conflict.

In the Loeser case Judge Lurton, speaking for the court, discussed Meyer Bros. Dr. Co. *vs.* Pipkin, and the case was not followed.

In re Boyd, 213 Fed., 774, 776, Little *vs.* Hardware Co. and Meyer Bros. Drug Co., *supra*, were cited. "A different conclusion" has been reached "in the sixth circuit and in the eighth circuit."

(The Boyd case went off on the proposition the contract there in issue was only "permitted," not "required," to be recorded.)

So we have a curious situation: The Connett case in the eighth circuit declined to follow Meyer Bros Dr. Co. *vs.* Pipkin in the fifth circuit. The Connett case is followed in the fourth and sixth circuits. It is made the basis of the amendment of June 25, 1910. (See Report House and Senate Committee on Judiciary, Original Brief, p. 19, where the amendment is said to be "perhaps merely declaratory of the law as it exists today as laid down in * * * Bank *vs.* Connett.") The eighth circuit then attempts to distinguish the Connett case (207 Fed., 537); cites as authoritative (207 Fed., 537) *In re* Jacobson & Perrill, 200 Fed., 812, based on Meyer Bros. Drug Co. *vs.* Pipkin (200 Fed., 814), the antithesis of the Connett case.

In re Sturtevant, 188 Fed., 196, 198, it is pointed out the Connett and Loeser cases are in conflict with Meyer Bros. Drug Co. *vs.* Pipkin.

In the Fifth Circuit Judge Speer still clings to Meyer Bros. Drug Co. *vs.* Pipkin;

In re Virgin, 224 Fed., 128;

In re Brown Wagon Co., 224 Fed., 266,

While *In re* Bazemore, 189 Fed., 236, Judge Grubb, who participated in the decision in Keeble *vs.* John Deere Plow Co., 190 Fed., 1019, gave effect to the amendment of June 25, 1910.

The Bazemore case (189 Fed., 236) was decided by Judge Grubb May 12, 1911. He participated in the Keeble case November 27, 1911 (190 Fed., 1019).

Judge Newman also gives effect to the amendment.

In re Whatley Bros., 199 Fed., 326.

See also opinion of Judge Grubb:

In re Calhoun Supply Co., 189 Fed., 537.

Of Judge Newman:

In re Farmers' Supply Co., 196 Fed., 990.

In re Social Circle Cotton Mills, 213 Fed., 994.

In fact the only logical ground of which the result reached in Big Four Impl. Co. *vs.* Wright, 207 Fed., 535, and in its progeny, the case at bar, Baker Ice Mach. Co. *vs.* Bailey, 209 Fed., 603, may be predicated is that in each of them it may be claimed if the contracts are held to be of conditional sale the court was not dealing at all with transfers of property.

"So in the case at bar Grant Bros. (the bankrupts) never transferred the machinery to the Baker Ice Machine Company, because it had never been transferred to them" (209 Fed., 605).

And to that branch of the case we shall now address ourselves.

XI.

The contract fixed the total contract price at \$5,940 (Rec., 12). The petition in intervention admits payments amounting to \$3,200.14. In these circumstances the Circuit Court of Appeals held no title or interest of any kind vested in the bankrupts. Nevertheless, it permitted the trustee in bankruptcy to retain the property if he "shall, within a time to be named, pay the balance due from Grant Brothers to the Baker Ice Machine Company for the purchase price of the machinery." These respective positions are wholly inconsistent.

It is not a question did the bankrupts own the property described as the ice-making plant. The question is: Did the bankrupt make "a transfer of any of his property?" (60a, National Bankruptcy Law).

The term—

"property is said to be *nomen generalissimum* and to include everything which is the subject of ownership" (32 Cyc., 648).

"Any attempt to enumerate the subjects of property would be impracticable, since property includes whatever things may be the subject of ownership, and all rights, titles and interests therein" (32 Cyc., 651).

We quote the following from 6 Words and Phrases, 5693, 5694:

"Property is *nomen generalissimum*, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other incorporeal hereditaments."

"Property signifies every species of property. It is *nomen generalissimum*, and comprehends all a man's worldly possessions."

"In its proper sense property includes everything which goes to make up one's wealth or estate."

"The term 'property' means everything of exchangeable value."

" 'Property,' according to the definition in Jacob, 'is the highest right a man can have to anything, being used for that right which one hath to lands or tenements, goods or chattels, which in no way depend on another man's courtesy. '"

Words and Phrases, p. 1274 (2d series) :

" 'Property' is *nomen generalissimum*, and extends to every species of valuable right and interest, including real and personal property, easements, franchises, and other corporeal hereditaments."

"The term 'property' includes everything of value, tangible or intangible, capable of being the subject of individual right or ownership."

" 'Property' means everything of exchangeable value, and includes money, chattels, things in action, and evidence of debt."

" 'Property,' within the tax laws, includes every species of valuable right and interest."

"Vigintillion" is said to be one million, raised to the twenty-first power in arithmetical progression—thus "billions, trillions," etc.

"It is urged that the sale of one vigintillionth of the mortgaged premises was equivalent to a sale of nothing at all; because the amount was so small as to be utterly unappreciable to the senses when aided by the most powerful instruments. * * * While the portion sold is so minute as to be unappreciable by the physical senses, nevertheless the mind recognizes it as a real entity."

Conn. Mut. Life Ins. Co. *vs.* Stinson, 62 Ill. App., 319, 330.

The definition of "transfer" in National Bankruptcy Act, section 1, subdivision 25, is inclusive:

" 'Transfer' *shall include* the sale and every other and different mode of disposing of or parting with

property, or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

Webster's New International Dictionary defines "transfer" as "any act by which the property of one person is vested in another."

" 'Transfer' is defined to be not only the sale of property, but 'every other mode of disposing or parting with property.' All technicality and narrowness of meaning is precluded. The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.' "

Pirie vs. Chicago Title & Trust Co., 182 U. S., 438, 444 (McKenna, J.).

What is the nature of the interest of the vendee in a conditional contract of sale?

In Williston on Sales, at section 326, speaking of the Uniform Sales Act, it is said:

"The sales act makes no special provision in regard to the rights of creditors of the buyer or seller when property is sold conditionally. But the principles applicable to the subject are plain. * * * The buyer's right is a property right; * * * the interest of the buyer may be subjected to the claim of creditors. * * * The buyer's right is in its nature analogous to that of a mortgagor."

In section 331 the author says of a case of a conditional sale:

"Under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of

the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, *he can transfer by sale or mortgage.*"

In section 332 it is stated:

"The right of the conditional buyer may be assigned."

Both Williston and Benjamin place the liability of a conditional vendee, in case of the accidental destruction of property, upon the nature of the interest which the vendee has in the property in question.

In Williston on Sales, at section 304, it is said:

"Where goods are delivered to the buyer, the title is retained by the seller until the price is paid, the buyer immediately acquires the right to use the goods as his own, and has indeed exactly the same power over them, and right in regard to them that he would have if he had bought them and mortgaged them back to secure the price. * * * It seems properly to follow that if the goods are accidentally destroyed or injured, that the buyer must stand the loss; that is, he must pay the price in full at the time agreed."

In Benjamin on Sales (7th ed.), Bennett's Notes, at page 300, it is said:

"The buyer also immediately acquires an interest (in the goods of a conditional sale) a devisable interest which he can sell or convey at any time prior to breach of condition: and if he does so, and afterwards duly pays or tenders the price to his vendor, or the latter waives the payment, the subvendee's title will become perfect without any new transaction or bill of sale. * * * The buyer has an attachable interest, and upon tender by the attaching creditor of the amount due, the title passes to the buyer subject to the attachment. * * * And if the goods are wrongfully taken from a conditional vendee by a third party, even after breach of condi-

tion, he can recover their full value of the wrongdoer. * * * For such vendee is still an owner, and being an owner, he must pay the full price agreed upon, although the goods are destroyed by fire or otherwise while in his possession, and without his fault."

In Williston on Sales, section 334, the author says:

"Risk of loss should properly fall upon the party who has the beneficial incidents of title rather than upon the party who has the legal title alone. In the case of mortgage, even though a mortgagee is deemed to have the legal title, the risk of loss is upon the mortgagor. The same result should be reached in the case of a conditional sale; and under the sales act it has been expressly so provided; apart from statutes the weight of authority supports the same result."

It appears in Williston on Sales, section 22, subdivision (a), Uniform Sales Act provides:

"Where delivery of the goods has been made to the buyer * * * in pursuance of the contract and the property in the goods has been retained by the seller merely to secure performance by the buyer of his obligation under the contract, the goods are at the buyer's risk, from the time of such delivery."

is statute

This is now ~~the~~ law in the following States of the Union: Arizona, Connecticut, Maryland, Massachusetts, New Jersey, New York, Ohio, Rhode Island, Wisconsin.

In re Peasley (N. H.), 137 Fed., 190 (March 20, 1905), Aldrich, J., quoted with approval from 1 Washburn on Real Property (4th ed.), *509, that, "where the contract is executory, as fast as the purchase money is paid in, it is a part performance of such contract, and to that extent the payment of the money, in equity, transfers to the purchaser the ownership of a corresponding portion of the estate."

See also Story's Eq. Jur., sec. 1217 and note;
Pomeroy's Equity, secs. 167, 1263;
Jones on Liens, secs. 1061, 1105.

In Jones on Chattel Mortgages, 5th edition, section 117, it is said:

"An interest in property which one may perfect by fulfilling an executory contract, may in equity, be the subject of a mortgage. * * * One in possession of property under a conditional sale, may mortgage his interest, such as it is, and on payment of the price the mortgage will become valid."

"The fact that the term 'owner' is not limited in its signification to one who holds a perfect title to property must not be overlooked. * * * In *B. & O. R. Co. vs. Walker*, 45 Ohio St., 577, 585, it is said that: * * * An owner is not necessarily one owning the fee simple or one having in the property the highest estate it will admit of. One having a lesser estate may be an owner and indeed there may be different estates in the same property vested in different persons, and each be an owner thereof."

United States vs. Ninety-Nine Diamonds, 139 Fed., 961, 970 (Sanborn, J., Hook and Adams, JJ., concurring).

"A conditional grantee has some title which he can convey, or which can be levied upon. *Currier vs. Knapp*, 117 Mass., 324; *Harrington vs. King*, 121 Mass., 269; *Chase vs. Ingalls*, 122 Mass., 381; *Newhall vs. Kingsbury*, 131 Mass., 445."

In re Harrington (Olmstead, referee), 29 Am. B. R., 690, 696.

Interest of Vendee.

In *Cutting vs. Whittemore*, 72 N. H., 107, it was held (Bingham, J.):

"* * * It has been held that the conditional vendee, while in possession under the contract of sale, has an interest in the property that he may give away (*Hatch vs. Lamos*, 65 N. H., 1); that he may sell (*Bailey vs. Colby*, 34 N. H., 29; *Nutting vs. Nutting*, 63 N. H., 221); that he may mortgage (*Chase vs. Ingalls*, 122 Mass., 381; 1 *Meecham*, Sales, section

588); that his creditors may attach (*Hervey vs. Diamond*, 63 N. H., 342; *Fife vs. Ford*, 67 N. H., 539; *Bingham vs. Vandergrift*, 93 Ala., 283); that it will pass to his assignee in insolvency (*Adams vs. Lee*, 64 N. H., 421); and that a performance of the conditional sale, after a transfer of the vendee's interest, either by the vendee or his assignee, will vest the title in the assignee, without further action by the vendor."

In *Lippincott vs. Rich*, 22 Utah, 196, the conditional vendees were two persons named Horn, doing business as Wasach Drug Company. The conditional vendees—

"Made an assignment of all their property, including the soda fountain, to John B. Forbes. * * * Thereafter Forbes assigned and sold the property to the Wasach Drug Company. * * * Whatever right Horn and wife possessed in the property was transferred to Forbes by the assignment. As to those parties, the assignment was valid. * * * The assignment operated as a quitclaim of all the assignor's interest in the property conveyed, in the same plight and condition as they held it themselves."

Interest of Conditional Sale Vendee.

In *Beach's App.*, 58 Conn., 464, 478, it is said of a conditional vendee:

"Under deed or contract, the Home Woolen Company had the possession, the right of possession, the right to use the property until default, and the right to acquire the legal title by the payment of the notes. * * * In other jurisdictions the doctrine is well established that such contracts vest an interest in the vendee, which is capable of sale or mortgage by him to a third person; so that the moment that vendee's title is perfected, it passes to such third person;"

citing a number of authorities.

In *American Iron Works vs. Richardson*, 55 Ark., 642, 647, it was said of a conditional vendee: "Faulks had an interest he could mortgage."

In *Chase vs. Ingalls*, 122 Mass., 381, it is said (Gray, J., concurring) of a conditional-sale vendee:

"Munroe had the legal possession, and a right in the property, which he might convey."

In *Currier vs. Knapp*, 117 Mass., 324, 325, it is said (Gray, J., concurring):

"The agreement between Dows & Co. and Proctor amounted to a conditional sale under which Proctor had an interest in the goods which he might convey, and which upon the performance of the condition by him became an absolute title in his grantee, without any further bill of sale."

In *Day vs. Bassett*, 102 Mass., 445, it was held that a conditional-sale vendee—

"Had a right to dispose of the property, with his right therein, such as it was, to the defendant."

In *Powers vs. Burdick*, 110 N. Y. Sup., 883, 885, it was said:

"The provisions in the agreement that the property should not be disposed of without the consent of Burdick (the conditional-sale vendor) was for his protection, so that the rights of innocent third parties should not intervene. It did not render the sale and transfer to plaintiffs of her husband's interest in the property, invalid; she took the property subject to the rights of Burdick. No other protection to Burdick was needed. He cannot claim the plaintiff acquired no title or interest in the property, but can only insist her interest is subject to his."

In that case the husband of the plaintiff was a conditional-sale vendee.

Interest of Vendee.

In *Albright vs. Meredith*, 58 Ohio St., 194, 199, Morrow purchased a cash register on a conditional-sale contract. Morrow then executed a mortgage to Meredith. The conditional vendor brought a suit to recover on the unpaid notes, recovered a judgment, and Albright, as constable, levied on the property. Meredith instituted an action in replevin against Albright. The court ruled: The mortgage executed by Morrow was valid, provided he

"had an interest in the register which could be the subject of mortgage. And this is not open to question, for he had paid a portion of the purchase money. This gave him an interest which he might mortgage. It is not necessary that the mortgagor shall have the entire title, a limited or special interest in property is sufficient to support a mortgage of it, and that this interest is acquired by conditional sale, does not alter the case. *Jones on Chattel Mortgages*, 114; *Crompton vs. Pratt*, 105 Mass., 255; *Day vs. Bassett*, 102 Mass., 445."

In *Carpenter vs. Scott*, 13 R. I., 477, 479, it is said:

"Such a transaction * * * is regarded in law as a conditional sale * * * under it the vendee acquires not only the right of possession and use, but the right to become the absolute owner upon complying with the terms of the contract. These are rights of which no act of the vendor can divest him, and which, in the absence of any stipulation in the contract restraining him, he can transfer by sale or mortgage. Upon performance of the condition of the sale, the title to the property vests in the vendee; or in the event that he has sold or mortgaged it, in his vendee or mortgagee, without further bill of sale;"

citing a number of Massachusetts cases.

In *Tufts vs. Brace*, 103 Wisconsin, 341, 344, the court said:

"The stipulation in that agreement, that the vendee should keep the goods insured for the amount of the plaintiff's claim, and that in case of loss, the same should be payable to him as his interest might appear, indicates an expectation that Converse's interest in the property should increase and that the interest of Tufts in the property should decrease as payments should from time to time be made thereon."

In the case at bar a similar stipulation appears in the contract in issue (Rec., 13).

The attention of the court is now called to cases holding a conditional vendee has an insurable interest in the property, the subject-matter of the contract.

In *Light vs. Greenwich Insurance Co.*, 105 Tenn., 480; 58 S. W., 851, the subject of the insurance was personal property. As to a portion of it, title had been retained "by vendors to secure unpaid purchase money." The court considered the cases and reached the conclusion:

"A purchaser of personal property in a conditional sale, reserving the title, is the equitable owner of the chattel."

In *Lancaster vs. Southern Insurance Company*, 153 North Carolina, 285; 69 Southeastern Reporter, 214, the question arose in this way: Mrs. Lancaster owned a farm and erected thereon a building and established a steam gin, including the engine and boiler. The gin, engine, and boiler were insured. It was admitted that notes reserving the title to the gin outfit were given and recorded and all of the purchase price had not been paid. The property was destroyed by fire, and the insurance company defended on the ground that the plaintiff was not the unconditional and sole owner of the property, as provided in the policy. The court said:

"In North Carolina, however, it is established in a case like the present, that when a bargainor sells

goods, taking notes for the purchase price, retaining title as security for the purchase money and delivers possession, that if the goods are destroyed by fire, the obligation to pay the notes is absolute and the loss must fall on the vendee. * * * From this we think it follows that by analogy to the possession obtaining in case of real estate, that the vendee, under the facts existent here, is the unconditional and sole owner of the goods within the meaning of the contract of insurance."

In *Phoenix Insurance Co. vs. Hillard* (Florida), 52 Southern, 799, the question at issue arose in this way: One Hillard was the owner of a sawmill and a stock of lumber. She purchased certain machinery and by agreement between her and the vendor, title to the machinery was reserved in the vendor until fully paid for. She thereupon insured the property. The property burned. The defense was,

In *Hartford Fire Ins. Co. vs. Keating*, 86 Md., 130; 63 Am. St. Rep., 499; 38 Atl., 29, the rule is stated: "To be 'unconditional and sole,' the interest must be * * * of such a nature that the insured must sustain the entire loss if the property is destroyed." That is precisely the situation in the case at bar.

"The policy expressly provided that it shall be void, unless otherwise endorsed on the policy, 'if the interest of the insured be other than unconditional and sole ownership.'"

The court ruled:

"Where a purchaser of personal property takes possession of it, but the title remains in the vendor until the purchase price is paid in full, the vendee in possession has an insurable interest in the property, even though he has not fully paid for it. * * * The interest of a purchaser of property, which he has unqualifiedly agreed to buy, and which the former owner has absolutely contracted to sell to him, upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause

upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs."

It was further ruled in the Florida case:

"A conditional sale of personal property by which the vendee takes possession of the property with a conditional promise to pay for it, but the vendor retains the title until payment in full of the purchase price is made, confers upon the vendor the absolute right to the purchase price, and imposes upon the vendee the unconditional obligation to pay the purchase price, *and also casts upon the vendee all the risks of loss incident to full and complete ownership of the property*, unless otherwise specially provided by contract." 6 Am. & Eng. Ency. of Law (2d ed.), 455.

"To be unconditional and sole the interest of ownership of the insured must be completely vested, not contingent or conditional, nor in common or jointly with others, but of such nature that the insured must alone sustain the entire loss if the property is destroyed; and this is so whether the title is legal or equitable * * *."

"By fair construction and intendment, the unconditional and sole ownership of property for the purposes of insurances is in those upon whom the loss insured against would certainly fall, not as a matter of mere contract obligation, but as the result of real *bona fide* rights in the property insured."

In *Stone vs. Waite*, 88 Alabama, 599; 7 So., 117, the rule is stated:

"When personal chattels are sold on condition that the seller retains title until paid for, and possession is delivered, the buyer may sell his interest subject to this right of the vendor. The title does not vest in the buyer until performance of the condition, and until it does pass the risk of loss remains in the seller. 1 Benj. on Sales, secs. 422-427."

It will be noted this case recognizes an interest in the buyer of property under a conditional sale contract.

In *National Cash Register Co. vs. South Bay Club House Association*, 118 N. Y. Supp., 1044, it was said:

"The plaintiff had nothing further to do. The title was retained by it merely as security for the unpaid purchase price. Automatically, when the defendant has performed its agreement the title reverts to it."

The question has frequently arisen with respect to executory contracts for the sale of real estate.

In *Baker vs. State Insurance Co.*, 31 Ore., 41; 48 Pac., 699; 65 Am. St. Rep., 807, it appeared that plaintiff—

"held a contract with the owners of the legal title for a conveyance, * * * conditioned upon completing payment therefor in certain installments and at designated dates."

A number of authorities are cited, and the court said:

"The instructions of the learned trial judge, touching the question, proceeded upon the theory that if plaintiff had contracted for the purchase of the land upon which the building was situated, had gone into possession, and performed on her part all the conditions thereof, to the date of the application, she should be deemed to be the owner, and for the purpose of the policy the title was in her name. This is in full accord with the authorities cited, and is, as we believe, the law of the case."

In *Hamburg-Bremen Fire Insurance Co. vs. Ruddell* (Tex.), 82 S. W. Rep., 826, it was ruled:

"If the insured had purchased a house and lot and had given notes to the seller, containing a vendor's lien on the property to secure the payment of the purchase money,"

and the seller had given—

“his bond for title to be executed upon payment of the purchase money,”

the purchaser became the sole and unconditional owner of the property within the meaning of an insurance policy.

In *Queen Insurance Company vs. May* (Tex.), 35 S. W., 829, the court said, as to the plaintiff:

“Was her ownership unconditional, and was the ground upon which the building was situated, owned by her in fee simple? Was she the unconditional owner, as well as the sole owner? She had improved the land under a verbal contract with the owner to convey it to her. She thus showed herself to be entitled to a specific performance of her contract, and could obtain a conveyance of the title upon payment of the purchase money. * * * Appellee must be regarded as the sole and unconditional owner of the property in fee simple, subject only to an insurance for the purchase money. *Insurance Company vs. Dunham*, 117 Pa. St., 460; 12 Atl., 668. The case cited reviews the authorities, and shows that the doctrine stated, has been generally adopted.”

In *Pennsylvania Fire Insurance Co. vs. Hughes*, 108 Fed., 497 (C. C. A., 5th Circuit), the doctrine announced in *Loventhal vs. Insurance Company*, *infra*, was accepted as conclusive to the real estate in question in that case. As to personal property, the court ruled:

“If the common law in force in that State (Alabama), as construed by its Supreme Court, declares that as to real property an unconditional estate is conveyed by a bond for title, on the theory that the seller holds a vendor's lien, and the real estate passes to the purchaser subject to this lien; it seems to us that this theory would have greater force as to personal property, title to which passes by delivery unless the parties have expressly stipulated otherwise.”

In that case the insured had purchased a foundry property, together with a lot of personal property in connection therewith. The purchaser gave his note and the vendor gave a bond for title, conditioned upon the payment of the note. In this state of the title the purchaser took out a policy in his own name, which provided that it should be void if the ownership of the insured was not "absolute, unqualified, and undivided." The insured was allowed to recover.

In *Milwaukee Mechanics Insurance Co. vs. Rhea*, 123 Fed., 9, 10, the opinion is by Lurton, J., Severens and Richards, JJ., concurring. It is said:

"That a vendee in possession under a written agreement for the sale and purchase of the property is the equitable owner thereof; and authorized to represent himself as the owner, or the 'sole and unconditional owner,' within the meaning of that term in fire policies, is hardly the subject of debate. * * * If the vendees unconditionally bound themselves to buy and pay for the property in question, they were in every equitable sense the owners, and a loss of the property by fire would fall upon them and not the vendor.

"In *Paine vs. Miller*, 6 Ves., Jr., 349, where an agreement for the sale and purchase of improved property was enforced after the destruction of the improvements by fire, and before title passed or possession changed, Lord Eldon said: 'If the party, by the contract, has become in equity the owner of the premises, they are his to all intents and purposes; they are vendible as his, chargeable as his, capable of being encumbered as his. They may be devised as his, they may be assets and they would descend to his heir.'

"The rule is the same under a representation of ownership in a fire policy, whether the vendee be in possession under an oral or written unconditional contract of purchase. If he has unconditionally agreed to buy, and the vendor to sell, upon definite terms, he is the sole and unconditional owner within the meaning of that term in fire policies."

Citing a number of authorities. The court further said:

"It is only when there has been an acceptance of a proposal to sell, that the vendee becomes in any sense the equitable owner of the subject-matter of the option."

Loventhal *vs.* Home Insurance Co., 112 Ala., 108; 57 Am. St. Rep., 17, is an exhaustive discussion of the whole subject. The authorities, both text writers and decided cases, are reviewed in *extenso*. It is held that a vendee of land in possession, exercising acts of ownership under an executory contract of purchase, and holding a bond of the vendor to make title upon full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner of the land.

The court said:

"In many of our decisions we have said that the relation of vendor to vendee, in cases like the present, is precisely that of mortgagee or mortgagor. All of the incidents of the latter relation attach to it. * * * The vendor of real estate, who has not executed a deed to the purchaser, holds the legal title as security for the payment of the purchase money, and if he executed a bond to make title when the purchase money is paid, the contract, in a court of equity, will be considered in the nature of a conveyance back by way of mortgage."

In Dupreau *vs.* Hibernia Insurance Co., 76 Mich., 615; 43 N. W., 585; 5 L. R. A., 671, the court said:

"It appears that the plaintiff held the premises upon which the buildings were situate, and the buildings under a land contract of purchase. * * * The plaintiff had paid quite a sum on the purchase price, and entered into an undertaking to pay the balance, and was to have immediate possession of the premises under the terms of the contract, and was to keep the buildings thereon insured. He was in actual possession at the time of taking the policy, and

equitably the owner in fee, and we think he may be said at that time to have been the entire, unconditional and sole owner within the meaning of the terms of the policy. We think this doctrine is fully supported by numerous decisions."

In *Matthews vs. Capitol Fire Insurance Co.*, 115 Wis., 272; 91 N. W., 675, it was ruled the interest of a vendee in realty, under a land contract, was a "sole and unconditional ownership," within the meaning of a policy of fire insurance.

"The authorities elsewhere are uniform to the same effect. The idea is that equitable ownership is, properly speaking, entire and sole ownership as regards the real purpose of the provisions commonly used in insurance contracts on that subject. It does not mean that we are called upon to consider or discuss a matter so well settled as the law on the subject in question."

In *Pelton vs. Westchester Fire Insurance Co.*, 77 N. Y., 905, affirming 13 Hun., 23, a policy of insurance had been taken out in the name of Brown, who held under a contract executed to him by the owner of the fee-simple title. Brown was to purchase the premises in question and pay for the land in installments:

"It was provided that on failure to perform the contract on the part of Brown, Pelton (the plaintiff) might declare it forfeited. * * * From the moment the contract was executed and delivered, Brown was in equity its owner. * * * He had a real, substantial, proprietary interest in the property; in the event of his death it would descend to his heir, and he could devise it by his will."

In *Insurance Company of North America vs. Erickson*, 50 Florida, 419; 39 Southern Reporter, 495; 111 American State Reports, 121; 2 Lawyers' Reports, Annotated (N. S.), 512, the following was quoted from *Phenix Insurance Company of Brooklyn vs. Kerr*, 129 Federal Reporter, 723:

"The interest of a purchaser of property, which he has unqualifiedly agreed to buy and which the former owner has absolutely contracted to sell to him upon definite terms, is the sole and unconditional ownership within the true meaning of the ordinary clause upon that subject in insurance policies, because the vendor may compel the vendee to pay for the property and to suffer any loss that occurs."

The Florida court continues:

"Upon the execution and delivery of the contract of sale set up in the defendant's plea, the vendor Erickson became the holder of the legal title in trust for his vendee Burch as security for the deferred purchase price due from the latter to the former, and the vendee Burch held the purchase price as trustee for his vendor. 2 Story's Equity Jurisprudence, 136, section 789."

In a note, 111 American State Reports, 128, it is said:

"A vendee of land in possession exercising the acts of ownership under an executory contract of purchase, and holding the bond of the vendor to make title upon a full payment of the purchase money, a portion of which remains unpaid, is the unconditional and sole owner of the land in fee, within the meaning of these words as used in contracts of fire insurance."

In the report of the Erickson case at 2 Lawyers' Reports, Annotated (N. S.), 512, there is a note to the effect:

"The decisions are uniform in their adherence to the doctrine * * * that one who is at the time of the issuance of a policy of fire insurance, under contract to sell to another who has absolutely bound himself to purchase the real property insured, cannot recover in case of a loss upon a policy providing that it shall be void for the interest of the insured, unless otherwise stated, by other than 'unconditional and sole ownership.'"

The case of Phenix Insurance Company vs. Kerr, 129 Federal Reporter, 723; 66 Lawyers' Reports, Annotated, 509,

cited in the Florida case, is an exhaustive review of the law of the subject, and a number of cases are cited in support of the proposition stated.

But the plaintiff was denied a recovery under a condition in the policy "that the same shall be void if the subject of insurance be personal property and be or become encumbered by a chattel mortgage." The court said:

"The goods therefore retained their character as personalty, and in that aspect the claim of the vendor in this instance was only an encumbrance in the nature of a chattel mortgage to secure the purchase money, and on the facts, the stipulation as to the non-existence of such an encumbrance has been violated. * * * Under the facts presented, as hereinbefore stated, this is in effect an encumbrance in the nature of a chattel mortgage."

In *Imperial Fire Ins. Co. vs. Dunham*, 117 Pa. St., 460; 2 Am. St. Rep., 686, it is held: "Where articles of agreement are entered into for the sale of land, the purchaser is considered the owner. 'It does not seem to be necessary, to produce this effect, that any part of the purchase money should be paid; it results from the contract. Where a part of the purchase money is paid, the interest of the purchaser in the land is not circumscribed by the extent of the money paid, but embraces the entire value of the land over and above the purchase money due. He is treated as the owner of the whole estate, encumbered only by the purchase money. If the land increase in value, it is his gain; if it decreases, if its improvements are destroyed by fire or otherwise, it is his loss.' *Siter, James & Co.'s Appeal*, 26 Pa. St., 180. Where the vendor retains the legal title, he has a lien for the unpaid purchase money."

In *Ætna Fire Ins. Co. vs. Tyler*, 16 Wend., 385; 30 Am. Dec., 90, Chancellor Walworth said: "The person who is in possession of real property as owner, under a valid and subsisting contract for the purchase thereof, whether he has

paid the whole of the purchase money and gotten the legal title or not, is called the owner thereof, and the property is usually called his by others. In equity it is, in fact, his; and the vendor only has a lien thereon for the security of his unpaid purchase money."

In *Johannes vs. Standard Fire Office*, 70 Wis., 196; 5 Am. St. Rep., 159: "The legal title to the property was in another party, with whom the insured had, at the time of the application, made a parol contract for its purchase, for a price agreed upon, which the insured had agreed absolutely to pay, and a part of which he had paid, and the insured had entered into possession as purchaser and made valuable improvements on the property." The foregoing was quoted from *Hough vs. City Fire Ins. Co.*, 29 Conn., 10; 76 Am. Dec., 581. Held, the insured "was to be regarded as the owner of the property, if he had the equitable title, and his interest was such if the loss would fall on him if destroyed."

In *Rumsey vs. Phoenix Ins. Co.*, 1 Fed., 396, it is held (Wallace, J.): "A party in possession of insured premises under a valid subsisting contract of purchase is the equitable owner, and has an insurable interest, although he has not paid the whole consideration money."

In *McWilliams vs. Cascade Fire & Marine Ins. Co.*, 7 Wash., 52; 34 Pac., 140, it was said of a purchaser under a conditional-sale contract: "*Her interest*, as we have said, was an insurable one, but it was a conditional interest." The case at bar proceeded in the Circuit Court of Appeals that when the contract was filed for record, the purchaser had no interest in the property. The Washington case cites *Seiss vs. Ins. Co.*, and *Ins. Co. vs. Weaver*. (*See post* 163)

In *Lasher vs. St. Joseph Fire & Mar. Ins. Co.*, 86 N. Y., 423, 427, it was said of a conditional vendee: "She had but a small interest therein (the property) under an unperformed contract of purchase."

In *Liverpool, etc., Insurance Co. vs. Ricker*, 10 Tex. Civil App., 264; 31 S. W., 248, it is pointed out that the rule in

Texas is to the effect that a vendor (selling land under a deed, where the vendor's lien was expressly reserved in the deed, and the vendor had the right when default is made by the vendee in the payment of the purchase money either to foreclose his vendor's lien or elect to rescind the contract and recover the land) held the superior title to the land until the purchase money was paid.

With respect to the rights of the vendee, it is pointed out:

"If the property is damaged or destroyed, the vendee is still bound for the purchase money remaining unpaid, and the loss of the property falls entirely on him. * * * All of this, to our minds, is inconsistent with the idea *that the superior title in its fullness remains with the vendor.*"

Authorities were cited to the effect that:

"A party in possession under a contract of purchase, considered to be in force, is the owner in equity."

There are a few cases to the contrary.

In *Dumas vs. Northwestern Nat'l Ins. Co.*, 12 App. D. C., 245; 40 L. R. A., 358, it was held, in the case of personal property, it appearing that the property had been purchased on the installment plan, "whereby the vendor company remained the owner of the property until full payment was made for it," that "it is not apparent how, in any sense of the words, she (the insured) can be regarded as the sole and unconditional owner of the residue of the property. The ownership of that residue was purely and simply conditional." The report does not disclose whether the obligation on the part of the purchaser to pay the purchase price was optional or absolute. The distinction is made in *Phoenix Ins. Co. vs. Kerr*, 129 Federal Reporter, 723, 727. In the case at bar the obligation, by the terms of the contract, is absolute on the purchaser.

In *Phoenix Ins. Co. vs. Public Parks Amusement Co.*, 63

Arkansas, 187; 37 Southwestern Reporter, 959, it was ruled: "A part of the property insured and destroyed was held under the terms of a sale by which title was reserved in the seller until the purchase price should be fully paid and (that) it had never been paid * * * the assured did not have the unconditional and sole ownership of the property." Nothing appears in that case to show whether the obligation to pay the price was absolute or optional.

In *Geiss vs. Franklin Ins. Co.*, 123 Indiana, 172; 24 Northeastern Reporter, 99; 18 American State Reports, 324, notes had been given for the purchase price, "in each of which it was stipulated, in effect, that the title to the property should be and remain in the seller until the notes given for the purchase price were all fully paid." The court said: "It is conceded that the assured was not the sole, absolute, and unconditional owner of the soda-fountain and apparatus connected therewith."

In *Westchester Fire Ins. Co. vs. Weaver*, 70 Maryland, 540; 17 Atlantic, 401; 5 L. R., 478, it is ruled: "The sale of (the piano) to the plaintiff was a conditional sale, and the title did not vest in the plaintiff until all the conditions had been complied with, and he was not, as the policy required him to be, the unconditional owner of it at the time of the insurance. The clause in the instrument of sale which required the plaintiff to pay the full value in case of the destruction by fire, does not affect the question."

The question has also arisen in this form: Assuming the property which is the subject-matter of the contract is accidentally destroyed, is the vendee excused from paying the balance of the purchase price? The cases which put the liability on the vendee do so on the ground he has an interest in the property.

In *American Soda Fountain Company vs. Vaughn*, 69 New Jersey Law, 582; 55 Atlantic Reporter, 54, the soda-water apparatus was sold under a contract which provided that the title to the apparatus should not pass until all the

notes were paid. The apparatus was destroyed by fire before the maturity of the notes. The court said:

"What was the consideration of the note? If the passing of the title to the apparatus was the consideration, the defense must prevail. If the delivery of the apparatus, with the right to acquire title was the consideration, the plaintiff must prevail. We think the consideration for the note was the delivery of the apparatus *with the right to acquire title*. * * *

"The language of the note and order also indicates that the obligation of the defendant was absolute immediately upon the delivery of the goods, and was not conditional in any way upon the passing of title. *The title was retained by the plaintiff merely as security for the unpaid purchase money.* Nothing remained to be done by the plaintiff to perfect the title of the defendant; that title would have become perfect immediately upon payment."

In *Osborn vs. South Shore Lumber Company*, 91 Wisconsin, 526; 65 Northwestern Reporter, 184, the contract in issue provided that "the legal title to and right of possession of (the property in controversy) shall be and remain in the party of the first part as security for the unpaid purchase price until the same shall have been fully paid." Some of the logs were lost after they were delivered into the possession of the defendant. A question arose who should stand the loss. The court said:

"The sole question presented is whether defendant is liable for the logs that were lost in view of the fact that plaintiff retained the title solely as security.

"Where property is sold and delivered and the vendor has fully performed all the conditions of the contract of sale on his part and the intention of the parties at the time of the making of the contract, as in this case, clearly is that the vendor is to have no interest in the property after delivery except as security for the unpaid purchase money; that, subject to the right to resort to said property as such security, the entire dominion and control over the same was turned over to and assumed by the vendee, as such,

although for the purpose of retaining effectually the security, the contract of sale provides that the title and right of possession shall remain in the vendor, as security until the purchase price is fully paid, and though the amount of the property is not to be ascertained by a measurement, in order to determine the amount of the purchase money,—if any of such property is lost after such delivery, before measurement, such loss must fall upon the vendee whether the loss accrues through his negligence or otherwise, and the amount of such lost property may be ascertained by competent evidence. The relation of the parties to each other in respect to the question here presented in such a case, is the same as between a mortgagor and mortgagee of personal property, though the form of the instrument be that of a conditional sale; and the authorities holding that in case of a conditional sale, strictly so called, the risk of loss is on the vendor until title actually vest in the vendee, have no application whatever to such a state of facts. The conditional vendee, having possession subject only to the vendor's reservation of title as security for the unpaid purchase money, is in a sense the owner; if he pays the purchase money, he becomes the absolute owner, without any new transaction or bill of sale; if the goods be wrongfully taken away from him by a third party, he may recover their full value of the wrongdoer; and if the property is lost or stolen while in his possession, whether by or without fault on his part, he must nevertheless pay the full price agreed upon."

In *Harley & Willis vs. Stanley*, 25 Oklahoma, 89; 105 Pacific Reporter, 188; 138 American State Reports, 900, there is an extensive collection of authorities on the subject. That court reached the conclusion that—

"In the circumstances now under discussion, the loss or destruction of the property, while in the possession of the vendee before payment, without fault, does not relieve him from the obligation to pay the price," citing 6 Am. & Eng. Enc. of Law (2 ed.), p. 455.

The text cited is based on decisions which are noticed in the course of the brief. In the Oklahoma case the authorities, pro and con., analyzed in the course of the brief are also cited.

In *Tufts vs. Wynne*, 45 Missouri Appeal Reports, 42, the right of the seller to recover of the purchaser, in the circumstances outlined, was based on the case of *Snyder vs. Murdock*, 51 Missouri, 175. In Missouri an intermediate appellate court is bound by the last controlling decision of the Supreme Court.

In *Snyder vs. Murdock*, 51 Missouri, 175, it was held:

"After an executory contract for the conveyance of real estate had been entered into, by the execution of a bond for title and the notes for the purchase money, the property is at the risk of the purchaser. If it burns up, it is his loss; if it increases in value, it is his gain; this is the settled equity doctrine and is based upon the principle that in equity what is agreed to be done must be considered as done.
* * * A vendor ordinarily is not bound to part with his title until all the purchase money is paid; he can retain the title as security for the purchase money unless he has bound himself to make the title before payment."

Taking as our text—"the principle that in equity what is agreed to be done must be considered as done," which is the basis of the conclusion reached in *Snyder vs. Murdock*, *supra*, quoted and followed in *Tufts vs. Wynne*, *supra*, it is instructive to consult Pomeroy on Equity Jurisprudence.

In volume 1, Pomeroy Equity Jurisprudence, in section 105, it is stated that—

"Applying one of its fruitful principles, that what ought to be done is regarded as done, equity says that from the contract, even while yet executory, the vendee acquires a real right, the right of property in the land, which though lacking a legal title, and therefore equitable only, is none the less the real beneficial ownership; subject, however, to a lien of

the vendor as security for the purchase price as long as they remain unpaid. This property in the land upon the death of the vendee descends to his heirs, or passes to his devisees, and is liable to the dower of his widow. The vendor still holds the legal title but only as trustee, and he in turn acquires an equitable ownership of the purchase money; his property, as viewed by equity, is no longer real estate, in the land, but personal estate in the price, and if he dies before payment, it goes to his administrators and not to his heirs. In short, equity regards the two contracting parties as having changed positions, and the original estate of each as having been converted, that of the vendee from personal into real and that of the vendor from real into personal property."

In volume 1, in section 368, it is said:

"The full significance of the principle that equity regards and treats as done that which ought to be done throughout the whole scope of its effects upon equity jurisprudence, is disclosed in the clearest light by the manner in which equity deals with executory contracts for the sale of land or chattels, which presents such a striking and complete contrast with the legal method above described. * * * So far as the interest or estate in the land of the two parties is concerned, it is regarded as executed, and as operating to transfer the estate from the vendor and to vest it in the vendee. By the terms of the contract the land ought to be conveyed to the vendee, and the purchase price ought to be transferred to the vendor; equity therefore regards this as done; the vendee as having acquired the property in the land, and the vendor as having acquired the property in the price. The vendee is looked upon and treated as the owner of the land: an equitable estate is vested in him commensurate with that provided for by the contract. * * * although the vendor remains owner of the legal estate, he holds it as a trustee for the vendee, to whom all the beneficial interest has passed, he having a lien on the land, even in possession of the vendee, as security for the unpaid portion of the purchase money. The consequences of

this doctrine are all followed out. * * * The vendee is entitled to any improvement or increment in the value of the land after the conclusion of the contract and must himself bear any and all accidental injuries, loss or wrongs done to the soil by the operations of any, or by tortious third persons not acting under the vendor. The equitable interest of the vendor is correlate with that of the vendee; his beneficial interest in the land is gone and only the naked legal title remains which he holds in trust for the vendee, accompanied however, by a lien upon the land as security when any of the purchase price remains unpaid. This lien, like every other equitable lien, is not an interest in the land, it is neither a *jus ad rem* nor a *jus in re*, but merely an encumbrance."

In volume 3, in section 1046, it is said:

"A trust is created by a contract for the sale of the land. * * * The vendor holds the legal title as a trustee for the purchaser."

In volume 3, in section 1161, it is said:

"A contract of sale, if all the terms are agreed upon, also operates as a conversion of the property, the vendor becoming a trustee of the estate for the purchaser and the purchaser a trustee of the purchase money for the vendor."

In volume 4, in section 1406, it is said:

"The effect of an executory contract for the sale of lands, in working an equitable conversion and in clothing the purchaser with an equitable estate in the land, and the vendor with an equitable ownership of the purchase price, has already been described (referring to the sections hereinbefore cited); as soon as the contract is finally concluded although it is wholly executory in form, these rights and estates become fixed and vested. It follows therefore that the purchaser, being the equitable owner, is entitled to all the benefits and assumes all the risks of ownership."

In 1 Remington on Bankruptcy (2 ed.), section 20, it is said:

"Bankruptcy proceedings are a branch of equity jurisprudence. * * * and the rules of equity control rather than those of law,"

citing a large number of authorities.

In *Whitlock vs. Auburn Lumber Company*, 145 North Carolina, 120; 58 Southeastern Reporter, 909; 12 Lawyers' Reports, Annotated (N. S.), 1214, the whole subject is discussed at length. *Tufts vs. Wynne*, *supra*, is cited with approval. The court said:

"The general principle of liability on notes given for the purchase money of the personal property where title is retained as security for payment, is clearly stated in *Barrow vs. Anderson*, 3 Central Law Journal, 413, as follows: 'But the question here is: At whose risk was the property, and who must bear the loss? The purchaser by his note obligated himself to pay the price at a given time. There is no condition or contingency expressed in the note upon which he can avoid payment, and the question is whether he will supply such a condition. There is no doubt but that the title and the right of property by the terms of the note, remain in the seller, still the possession and right of possession were with the defendant, and the seller could not assert any claim to it until the buyer made default. The seller held the naked title, subject to the interest of the buyer; *i. e.*, the contingent right to a title which would vest absolutely, on payment of the price, without any further act on the part of the seller, the right to the use of the machine for two years, with the contingent right to a perfect title upon the payment of the price, constituted the consideration of the note.'

"The real and substantial nature of the transaction, for the purpose of determining who should bear the loss, is that of mortgagor and mortgagee, or lienor and lienee. The contract, it is true, creates technically a conditional sale, but the vendor in fact

only retains the legal title as a security in equity, and the title otherwise passes to the vendee with a lien for the purpose named."

In *Jessup vs. Fairbanks, Morse & Company*, 38 Indiana Appeals, 673; 78 Northeastern Reporter, 1050, the court said:

"The foregoing is a sale on condition. It is not a contract to make a future sale. It required nothing to be done by the vendor to pass title. * * * The contract being a personal contract of sale, its stipulation that the title should remain in the vendor until the full payment of the purchase price, did not relieve the vendee from the contract to pay, because the property was injured or destroyed" (citing a number of authorities).

The court quoted with approval from *American Soda Fountain Company vs. Vaughn*, 69 New Jersey Law, 582; 55 Atlantic Reporter, 54:

"We think the consideration of the note was the delivery of the apparatus, with the right to acquire title. The title was retained by the plaintiff merely as security for the unpaid purchase money. Nothing remained to be done by plaintiff to perfect the title of the defendant."

In *Hanover Fire Insurance Co. vs. Shrader*, 11 Tex. Civ. App., 255; 31 S. W., 1100, two persons were in partnership owning a stock of drugs and medicines. The case disclosed that at one time the stock was owned by Harris. He sold to G. W. Shrader, who in turn took a bill of sale in the name of M. E. Shrader, his wife. It was held that as the bill of sale was taken in the name of the wife for the benefit of the husband, the husband and his partner, Rogers—

"should be regarded as the sole and unconditional owners of the property insured. *An equitable title* meets the requirements that the interest of the insured shall be the entire, unconditional, and sole ownership of the property."

In *Tufts vs. Griffin*, 107 N. C., 47; 12 S. E. Rep., 68; 10 L. R. A., 526; 22 Am. St. Rep., 863, the right of the seller to recover was based on the proposition: "The vendee had an interest in the property, which he could convey, and which was attachable by his creditors," citing 1 Wharton on Contracts, section 617. But in the case at bar, the decision of the Circuit Court of Appeals is predicated of the proposition, "the machinery * * * had never been transferred to them," the bankrupts (Rec., 35), meaning thereby the bankrupts never had any interest in the machinery.

Tufts vs. Griffin, 107 N. C., 47, is also reported, 22 American State Reports, 863, 866, and in that volume there is a note to the effect:

"Where the terms of a simple sale of any specific piece of personal property are agreed upon, and the bargain is struck, while everything the seller has to do about it is completed, and he has authorized the buyer to take it, the contract of sale becomes absolute, without actual payment or delivery and the property is in the vendee, who has the risk of loss by accident or otherwise without the fault of the seller" (22 Am. St. Rep., 666).

In *Whitlock vs. Auburn Lumber Company*, 145 North Carolina, 120; 58 Southeastern Reporter, 909; 12 Lawyers' Reports, Annotated (N. S.), 1214, the whole subject is discussed at length. *Tufts vs. Wynne*, *supra*, is cited with approval. The court said:

"The general principle of liability on notes given for the purchase money of the personal property where title is retained as security for payment, is clearly stated in *Barrow vs. Anderson*, 3 Central Law Journal 413, as follows: But the question here is: At whose risk was the property, and who must bear the loss? The purchaser by his note obligated himself to pay the price at a given time. There is no condition or contingency expressed in the note upon which he can avoid payment, and the question

is whether he will supply such a condition. There is no doubt but that the title and the right of property by the terms of the note, remain in the seller, still the possession and right of possession were with the defendant, and the seller could not assert any claim to it until the buyer made default. The seller held the naked title, subject to the interest of the buyer; *i. e.*, the contingent right to a title which would vest absolutely, on payment of the price, without any further act on the part of the seller, the right to the use of the machine for two years, with the contingent right to a perfect title upon the payment of the price, constituted the consideration of the note.

"The real and substantial nature of the transaction, for the purpose of determining who should bear the loss, is that of mortgagor and mortgagee, or lienor and lienee. The contract, it is true, creates technically a conditional sale, but the vendor in fact only retains the legal title as a security in equity, and the title otherwise passes to the vendee with a lien for the purpose named."

In *Jessup vs. Fairbanks, Morse & Company*, 38 Indiana Appeals, 673; 78 *Northeastern Reporter*, 1050, the court said:

"The foregoing is a sale on condition. It is not a contract to make a future sale. It required nothing to be done by the vendor to pass title. * * * The contract being a personal contract of sale, its stipulation that the title should remain in the vendor until the full payment of the purchase price, did not relieve the vendee from the contract to pay, because the property was injured or destroyed" (citing a number of authorities).

The court quoted with approval from *American Soda Fountain Company vs. Vaughn*, 69 *New Jersey Law*, 582; 55 *Atlantic Reporter*, 54:

"We think the consideration of the note was the delivery of the apparatus, with the right to acquire title. The title was retained by the plaintiff merely

~~as security for the unpaid purchase money. Nothing remained to be done by plaintiff to perfect the title of the defendant."~~

Other cases have recognized the existence of an interest in the property on the part of the conditional vendee.

In *Sumner vs. Woods*, 67 Alabama, 139; 42 Am. Rep., 104, it was held that a *bona fide* purchaser from a conditional vendee "acquires only the *conditional title*" of the one selling to him, thus clearly recognizing the existence of at least a limited title in such conditional vendee.

In *Phillips vs. Hollenberg Music Company*, 82 Arkansas, 9; 99 Southwestern Reporter, 1105, a piano was sold payable in installments.

"The vendor retained title to the property until the purchase money was paid. * * * After the vendee had made two payments and before the others were due, the piano was destroyed by fire in the residence of the purchaser. * * * The obligation of the appellant to pay the purchase money became absolute upon the delivery of the piano and was not conditioned upon the vesting of the title in the purchaser. *The title was held by the vendor as security for the unpaid purchase money.* When it was paid, the title vested in the purchaser. Nothing remained for the vendor to do to complete the sale. On the contrary, he could not lawfully deprive the vendee of the property so long as she performed her contract, and she could not rescind the contract so long as he elected to enforce it. *She acquired an interest in the property, which she could mortgage or sell.*"

The case of *Burnley vs. Tufts*, 66 Mississippi, 48, was approvingly cited. In that case the court ruled: "The transaction was something more than an executory, conditional sale."

In a recent case this court discussed the nature of an interest of an entryman prior to patent issued.

"Laying aside for the moment the effect of the settlement, it is, we think, erroneous to regard the entryman's interest prior to actual possession as being nothing more than a color of title. From the making of his entry, the homesteader has the right of possession as against trespassers and all others except the United States; he has also an inchoate title, subject to be defeated only by failure on his part to comply with the requirements of the homestead law as to settlement and cultivation. So long as he complies with these laws in the course of earning a complete right to the lands as against the Government he has a substantial inceptive title, sufficient as against third parties to support suits in equity or at law. * * *

"The homesteader has a preferential right to the land, and in order to give effect to this according to the spirit of the laws it must be and is held that when he has fulfilled the conditions imposed upon him and receives a patent vesting in him the complete legal title, this title relates back to the date of the initiatory act, so as to cut off intervening claimants."

Knapp vs. Alexander Co., 237 U. S., 162, 166, 167.

In *First National Bank vs. Staake*, 202 U. S., 141, 146, the court quotes sections 67*c* and 67*f* of the national bankruptcy act, and then continues:

"This section makes two distinct provisions for the disposition of the property of an insolvent attached within four months prior to the filing of a petition in bankruptcy against him. First, such attachments shall be declared null and void, and the property affected shall be deemed released, and shall pass to the trustee of the estate of the bankrupt; or second, the court may order that the right acquired by the attachment shall be preserved for the benefit of the estate. In the first place, the whole property passes free from the attachment. In the second, so much of the value of the property attached as is represented by the attachments passes to the trustee for the benefit of the entire body of creditors, that is, 'for the benefit of the estate'—in other words, the statute recog-

nizes the lien of the attachment, but distributes the lien among the whole body of creditors.

"The first provision contemplates the attachment of property to which the bankrupt has the complete, legal and equitable title, which, as soon as the attachment is dissolved, passes at once to the bankrupt's trustee as part of his estate. The second provision evidently does not apply to this, as there is no object in preserving the lien of the attachment for the benefit of the estate, since under the first clause the entire value of the property attached passes to the trustee free from the attachment. *The second clause contemplates property in which the bankrupt has an interest which has been secured to attaching creditors by the levy of the writ*, but which might have passed to another person, as, for instance, a purchaser under an unrecorded deed, but for the fact that the attaching creditors had acquired a prior lien thereon. In such case, the statute recognizes the validity of the lien, but preserves it for the benefit of the entire body of creditors, by reason of the fact that the attachment was dissolved as a preferential lien in favor of the attaching creditors, by the institution of proceedings in bankruptcy. * * *

"The general rule relied upon by the bank in this case, that the words 'property of the bankrupt' mean only the property to which the bankrupt is beneficially entitled, and do not include property to which he has only a bare legal title, is perhaps justified by our decision in *Hewett vs. Berlin Machine Works*, 194 U. S., 296. But the extent to which the bankrupt court shall recognize *the rights obtained by creditors upon property attached as the property of the bankrupt, though in fact such property had been conveyed by an unrecorded contract*, is a matter solely within the discretion of Congress. The liens acquired in this case were liens upon property, which, as to attaching creditors, was the property of the bankrupt, and Congress may lawfully insist that it shall be reckoned as a part of his estate, and pass to the trustee."

Thus clearly intimating that a bankrupt may have an interest in property in which the legal title is in another, but, as

the creditors of the bankrupt may attack the conveyance vesting the legal title in another for want of record, it follows as to the creditors of the bankrupt, the property is that of the bankrupt.

Remember section 606 provides:

"If a bankrupt shall have * * * made a transfer of any of his property," then in certain circumstances, the transfer "shall be voidable by the trustee."

Section 67a:

"Claims which for want of record or for other reasons, would not have been valid liens as against the claims of the creditors of the bankrupt, shall not be liens against his estate."

But, under the statutes of Kansas, unless and until filed for record, the agreement in this case, whether the same be a contract of mortgage or of conditional sale, is as to the creditors of the estate absolutely void. In a recent Kansas case property delivered under an unrecorded contract of conditional sale became affixed to realty. Mechanics' liens by other than the vendor were asserted against the realty, and attempt was made to subject to the mechanics' lien the property delivered under the unrecorded contract of conditional sale. The court said:

"The plaintiff argues that the contract of sale was good between the parties to it; that the contract did in fact withhold title from the vendee; that the vendee obtained no title, whether the contract were recorded or unrecorded; that the title of lienors could not rise higher than the title of the vendee, who had none; and consequently that there was no ownership in the vendee of the crushers upon which mechanics' liens could be predicated. This argument merely flies in the face of the statute, which suspends the force of the provision in the contract of sale reserving title in the vendor, and so renders the sale

absolute so far as innocent purchasers and creditors are concerned, *until the contract is placed on record.*"

Geppelt vs. Middle West Stone Co., 90 Kansas, 539, 544, 545.

Hence it is respectfully submitted, even if the contract be held one of conditional sale prior to its recording, the same was absolutely void as to the creditors of the bankrupt. The bankrupt prior to the recording did have an interest in the property, because prior to its recording the property was applicable to the payment of his debts.

The filing of the contract for record, if such filing created any right whatever as a vendor, operated to transfer to the vendor the right to reclaim the property, and extinguished the right of the bankrupt through his creditors to have the property applied in payment of his debts.

See definition of "transfer" in *Pirie vs. Chicago Title & Trust Co.*, 182 U. S., 438, 444, "The word * * * is intended to include every means and manner by which property can pass from the ownership and possession of another and by which the result forbidden by the statute (a voidable preference) may be accomplished."

The recording of the contract operated clearly as a preference for unrecorded at the time of the bankruptcy the property would clearly have passed to the trustee. (See authorities, *ante*, —.)

At the time of its recording the constituent elements of a voidable preference existed. The referee found as a fact:

"11. That on the 15th day of May, 1912, the Baker Ice Company had reasonable cause to believe the said firm of Grant Brothers was insolvent, and that by filing the conditional-sale contract in the office of the register of deeds of Brown County, Kansas, it would effect a preference to the Baker Ice Company over the other creditors of said firm of Grant Brothers" (Rec., 21).

Hence the recording is voidable by the trustee and confers no rights.

In the cases hereinbefore cited, holding void unrecorded contracts of conditional sale, what is the result? Ordinarily when a contract is void no rights can be claimed under it by anybody.

United Shoe Mach. Co. *vs.* Ramlose, 231 Mo., 508, 528.

Strictly speaking, conditional sale recording statutes should be so written as to specifically provide that non-recording shall operate as a transfer of title, to be retransferred by the recording. Of course, to make void a chattel mortgage re-vests the title in the mortgagor. It may be argued to make void a contract of conditional sale cannot be said to pass any title because only by the contract being deemed valid and thereafter complied with, can the title be said to have passed. But conditional-sale recording statutes are usually based on chattel-mortgage recording statutes written in the light thereof and use the same language; therefore to be construed in *pari materia*.

What is really meant by conditional-sale recording statutes is that by reason of the non-recording the title to the property shall have passed by delivery, and the *reservation of title* is void. On no other theory are the courts justified in treating property, the subject-matter of unrecorded contracts of conditional sale (and for that reason void), as the property not of the vendor, but of the vendee.

"A delivery to the buyer will in the absence of anything to indicate a contrary intent, transfer the property in the goods as against the seller" (35 Cyc., 305).

It is the "contrary intent," the reservation of title, which is voided by the non-recording of the contract. The title then stands as having passed by the delivery, which in this case ante-dated the recording.

The subject now under consideration is also discussed in our original brief (pp. 24 *et seq.*).

That a conditional sale vendee is treated as having an interest in the property is shown *In re Sunflower State Refining Co.*, 195 Fed., 180. In that case property constituting a part of an oil refinery which had been adjudged bankrupt was claimed under a conditional sale contract. Pending the bankruptcy, the district court "ordered a sale of the property belonging to the bankrupt, free of all incumbrances and liens. * * * It appears when the property belonging to the estate was sold, the Carbondale Machine Company bid in the property sold to the bankrupt under the conditional sale" (195 Fed., 188).

If under a contract of conditional sale no title or interest passes to the vendee until condition fully performed, by what power did the court administering the estate of the vendee, sell the property of the vendor?

XII.

Viewed either as a contract of mortgage or as one of conditional sale, the contract is void as to all creditors of the bankrupts who became such after its execution in October, 1911, and its recording, May 15, 1912.

To state the proposition in another way: The intervener is estopped to set up its contract (having failed to file the same for record) against all who, while the contract was not of record, were entitled to treat the contract as void, and extend credit accordingly.

(In some jurisdictions, notably in New York [as herein-after shown] mortgages delayed in recording beyond a reasonable time become void both as to creditors antecedent the execution and intermediate the execution and recording. But in those cases the rule is recognized that if either an antecedent or intermediate creditor obtains a lien after recording, he may go to the origin of his debt and claim as

against him, the invalidity of the mortgage, notwithstanding its recording before the lien attaches. But these cases are in accord with our contention, it is the fact that the antecedent or intermediate creditor occupies that status, not the precise date on which the status is established, which is controlling.)

There is a multitude, almost a wilderness of cases bearing on this proposition. Before undertaking to examine some of them, it may be well to state what counsel perceive to be the underlying principle which governs.

Let us assume:

A executes an instrument evidencing a state of title which by statute is required to be recorded.

B, the party to the instrument whose duty it is to record the same, delays in so doing.

C is a creditor antedating the instrument.

D is a creditor subsequent to the instrument and prior to its recording.

The rights of C and D are clearly differentiable, though the distinction is not always clearly made.

As between B and C, no equities prevail. *Under the statute*, the instrument is void *until recorded*. It is a contest between B and C of a priority of liens. If B obtains a lien prior to the lien obtained by C through legal process, then the lien obtained through B's recording prevails.

But as between B and D, there is (as will be shown) "a *clear equitable right*" in favor of D against B, to insist that B as against D, shall make no claim under his instrument delayed in recording.

The lien which D is required to obtain through legal process to enforce this right does not, as in the case of C against B, create the right.

This lien is only evidence of the right.

Until D establishes his debt against A, he has no right to call on B for relief. It is not the date, but the fact, of D's lien which is controlling.

In the case at bar, the record discloses that the contract bears date October 14, 1911 (p. 15). The first shipment of machinery under the contract arrived in Horton, Kansas, on November 15, 1911, the second on November 20, 1911. On November 15, 1911, Grant Bros. (the bankrupts) borrowed \$2,500 from a bank at Horton, Kansas. The contract was filed May 15, 1912 (Rec., 21).

Here is a clear equity in favor of the intermediate creditor, assertable by the trustee. This equity is based on the fundamental propositions (among others):

"No man shall take advantage of his own wrong."
 "So use your own as not to injure another."

We quote from a note, 16 Cyc., 681:

"Negligent silence may work an estoppel as effectually as an express representation' (Tobias *vs.* Morris, 126 Ala., 535, 551; 28 So., 517 [citing Bigelow, Estop., 588]), for 'it is a just and well recognized principle, that "He who is silent when conscience requires him to speak, shall be debarred from speaking when conscience requires him to keep silent"' (2 Herman Estop. & Res. Jud., §§ 937, 938 [quoted in Harris *vs.* American Bldg., etc., Assoc., 122 Ala., 545, 554; 25 So., 200])."

Primarily, the question has been determined in this court as one of local law.

Holt *vs.* Crucible Steel Co., 224 U. S., 262 (Kentucky).

Detroit Trust Co. *vs.* Pontiac Bank, 237 U. S., 186 (Michigan).

In the first case the instrument was never recorded. It was held in the then state of the law no lien had ever been acquired by the trustee in bankruptcy. By the bankruptcy, as the law then stood, the creditor was debarred from getting a lien.

In the report of the Senate Committee on Judiciary (61st Congress, Report No. 691), at page 7, concurring in the report of the House Committee on Judiciary as to the effect of the proposed amendment, thereafter approved June 25, 1910, to section 47*a*, sub. 2, it is said: "In this way, in effect, proceedings in bankruptcy will give to creditors all the rights that creditors under the State law might have had had there been no bankruptcy and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee."

In the Detroit Trust Co. case, arising under the laws of Michigan, no lien had ever been acquired. A review of the Michigan cases will show in that jurisdiction the rule prevails, it is the fact, not the date, of the lien which is important in determining the rights of subsequent creditors.

In re Huxoll, 193 Fed., 851 (cited in *Detroit Trust Co. vs. Pontiac Bank*, 196 Fed., 186, quoted S. C., 237 U. S., 186, 188) it is said (p. 853): "This statutory invalidity of an unfiled chattel mortgage is not confined to those who have obtained judgment or levied attachment before the filing, but extends to all creditors who became such after the giving and before the filing of the mortgage. *Fearey vs. Cummings*, * * * In the first case cited it was said (41 Mich., page 383; 1 N. W., 951) that, if a mortgage 'was not put on file prior to plaintiffs' becoming creditors, it was invalid as against them, the law being that those who became creditors whilst the mortgage is not filed are protected, and not merely those who obtained judgment and levied attachments before the filing.'"

In the Huxoll case the rights of the subsequent creditors was denominated a "superior equity" (193 Fed., 856) which could not be enforced, because:

(a) The "superior equity" must be at some time enforced by legal process.

(b) It was not enforced prior to bankruptcy.

(c) The creditor was debarred by the bankruptcy. This

is the result it was desired to avoid by the amendment of June 25, 1910 (Report of Senate Committee on Judiciary, hereinbefore quoted).

Detroit Trust Co. vs. Pontiac Savings Bank, 196 Fed., 29, affirmed 237 U. S., 186, is based on *In re Huxoll*, *supra*.

Brown vs. Brabb, 67 Mich., 17, is an exhaustive review of the authorities denying relief to a prior creditor who complained of a delayed recording, clearly differentiating a prior creditor from a subsequent creditor, and pointing out that in many of the cases the facts do not show whether the court was dealing with a prior or a subsequent creditor.

Fearey vs. Cummings, 41 Mich., 376 (Campbell, Marston, Graves, and Cooley, JJ.), announces the doctrine: "If the mortgage * * * or, inasmuch as the possession was not altered, if it was not put on file prior to plaintiffs becoming creditors, it was invalid as against them; the law being that those who become creditors whilst the mortgage is not filed are protected, and no merely those who obtain judgments or levy attachments before the filing" (p. 383).

Putnam vs. Reynolds, 44 Mich., 113, was an instance of an unrecorded mortgage. Cooley, J., said: "If the mortgage was purposely left off the record, it was an act of bad faith, which might justify its being declared void in fact irrespective of the statute. * * * A tortious act can never be the foundation of an equitable right. *McCredie vs. Buxton*, 31 Mich., 383, 388."

In *Dempsey vs. Pforzheimer*, 86 Mich., 652, 655, it is ruled: "It is plain under the ruling of this court, that the Borgess mortgage was void for want of a filing, as against the original indebtedness of Harris & Karpp to defendants, incurred while the mortgage was in existence and not filed, and for goods sold by defendants in the usual course of business, in ignorance of the existence of such mortgage. * * * If the defendants before taking their mortgage, and after the filing of the Borgess mortgage, had proceeded against the property so mortgaged, and obtained by any process of

law a lien upon it, or had they obtained judgment upon their claim, and issued execution, and levied upon it, there can be no doubt but such lien or levy would have been good as against the Borgess mortgage."

In *Kennedy vs. Dawson*, 96 Mich., 79, it appeared:

Date of mortgage, October 12, 1891.

Date of recording, December 22, 1891.

Date of general assignment for benefit of creditors, January 25, 1892.

Held, the assignee could enforce the rights of the creditors, who became such intermediate, the execution, and the recording of the mortgage.

In *Baker vs. Parkhurst*, 119 Mich., 542, 545, it is said: "This court has uniformly held that the withholding of a chattel mortgage from file is a fraud upon parties extending credit to the mortgagor during the time it is withheld, and in ignorance of it, and that such mortgages are void as to such creditors."

"A chattel mortgage is invalid as against creditors if not put on file when the goods remain in the mortgagor's possession, and this applies to those who become creditors during the interval while the mortgage is not on file, and not merely to those who have obtained judgment or levied attachment before filing."

People vs. Burns, 161 Mich., 169, 173, 174.

So that nothing in *Holt vs. Crucible Steel Co.* or *Detroit Trust Co. vs. Pontiac Bank* precludes our contention in this case. Indeed, if the Michigan doctrine is to be adopted as a rule of general law, the trustee being since June 25, 1900, a "creditor holding a lien through legal proceedings," our contention will prevail.

But what is the Kansas rule on the subject?

A leading case in that jurisdiction is *Cameron vs. Marvin*, 26 Kansas, 612. It will be recalled, we are now discussing a case where B., the mortgagee, of his own volition files the

mortgage of record after credit has been extended. At 26 Kansas, 628, it is said: "As to what would be the rights of the parties in a case like the present, if the mortgagee should file his mortgage for record without the consent of the mortgagor, or should take possession of the property without the consent of the mortgagor, we do not now wish to decide. That question is not in the present case. That is possibly the question which was decided in the case of *Fearey vs. Cummings*, 41 Mich., 376."

In *Dayton vs. People's Savings Bank*, 23 Kansas, 421, 424, 425, the court was careful to say: "Again, in the case at bar, Bott, the judgment creditor, was not induced to give any credit to the mortgagor by any possession of the mortgaged property in the hands of Diehl, as his judgment was obtained in June, 1875, long prior to the execution of the mortgage."

In *McVay vs. English*, 30 Kansas, 368, it does not appear the attaching creditor became a creditor after the execution of the mortgage delayed in recording. The court said of the delay in recording mortgage, "Of course it becomes valid as against creditors and subsequent purchasers and mortgagees only, as of the date of depositing the same, and does not relate back so as to invalidate interests *or rights already* obtained by other persons in or to the mortgaged property" (30 Kansas, 371).

In *Wm. B. Grimes D. G. Co. vs. McKee*, 51 Kansas, 704, 707, it is said: "Possession was taken with the consent of the mortgagor, and under the numerous rulings, the mortgages then became valid."

American Lead Pencil Co. vs. Champion, 57 Kansas, 352, is apparently in favor of the validity of a delayed-in-recording mortgage as against intermediate creditors. Between June 6, 1890, the date, and December 22, 1890, the recording, credit was extended the mortgagor. "The only effect of a failure to file it (the mortgage) for record is to render it void as against the creditors of the mortgagor

* * * until it is filed for record or actual possession taken under it" (57 Kansas, 357).

The following cases are cited as authority for the proposition:

Cameron Hull & Co. *vs.* Marvin, 26 Kansas, 612.

McVay *vs.* English, 30 Kansas, 368, 371.

(Neither of which, as already shown, deals with subsequent creditors.)

Sedgwick City Bank *vs.* Mercantile Co., 45 Kansas, 346 (in which case the mortgage was recorded the day of its execution).

Gagnon *vs.* Brown, 47 Kansas, 83, in which a junior mortgage was the first recorded. Then the senior mortgagee took possession. Then defendant purchased the note secured by the junior mortgage. Held:

"The purchaser of a note secured by a subsequent mortgage upon the same property, taken by the mortgagee with notice of the prior mortgage, is bound to take notice of the possession of the first mortgage, acquired previous to such purchase."

So that none of the cases cited in American Lead Pencil Co. *vs.* Champion as authoritative discuss the precise question there decided. The proposition is stated broadly; is not reasoned out nor discussed in detail. But see the later case of Geiser Mfg. Co. *vs.* Murray, *infra*, to the contrary.

In Youngberg *vs.* Walsh, 72 Kansas, 221, it was held, a bill of sale dated June 11, 1902, not filed until November 2, 1903, and executed to Walsh, was equivalent to chattel mortgage. The bill of sale was joined in by Youngberg. Youngberg then purchased the stock at a sale under a chattel mortgage executed by Lockwood, the beneficial owner of the property, to Herron, dated November 21, 1903, filed November 24, 1903, to secure rent, part of which had accrued before November 2, 1903. The court said: "The failure of Walsh to place his bill of sale upon record was therefore immaterial, as to the Herron mortgage, for the reason that

when the latter was taken the Walsh bill of sale was on record. * * * Again, Herron * * * had actual notice of the Walsh mortgage and knew that it was on record before the execution of the one under which Youngberg claims. Youngberg was a party to the transaction with Walsh, had full knowledge thereof, and was again duly notified at the time of the mortgage sale at which he purchased the goods. He is in no better position than Herron would be, and probably not so good" (72 Kansas, 227, 228).

So that the case cited reduces itself to an attempt, by a man joining in a bill of sale intended to operate as a mortgage, to acquire an outstanding title under a mortgage junior in point of date, and then claim a right under that in conflict with that which he had himself granted.

But in *Geiser Mfg. Co. vs. Murray*, 84 Kansas, 450, the law of chattel mortgages in Kansas was thoroughly reviewed. A chattel mortgage, dated August 12, 1903, was not recorded until December 5, 1903. On August 18, 1903, the mortgagor became indebted to defendant, who, in January, 1905, reduced his claim to judgment and purchased the machinery at execution sale. The holder of the mortgage instituted replevin and failed to recover. A distinction was made between "creditors" as used in the statute and "subsequent purchasers and mortgagees in good faith" (72 Kansas, 451, 452). "In none of the cases cited was it decided that creditors stand in no better position under the chattel-mortgage statute than subsequent purchasers, or than subsequent mortgagees. * * * The right of a creditor is not recognized *until he acquires some specific claim upon the property.*"

But when the lien of the subsequent creditor was acquired (in that case, January, 1905) it took precedence of a mortgage recorded in January, 1903.

So that *Geiser Mfg. Co. vs. Murray* is a distinct recognition, in favor of an attaching creditor, as distinguished from a subsequent mortgagee, of the doctrine we are contending for in this case.

Geiser Mfg. Co. *vs.* Murray decides that a statement in a previous opinion of the Supreme Court of Kansas, "that actual notice is as effectual as constructive notice by record against subsequent purchasers and that a creditor stands in no better position" (89 Kansas, 872) is erroneous, and accordingly overruled. Paul *vs.* Lingenfelter approves Geiser Mfg. Co. *vs.* Murray on the question of the effect of knowledge by a creditor of the existence of an instrument delayed in recording or not recorded. In the later case, the instrument was not recorded. So the question of the effect of delayed recording did not arise.

In a recent case in Kansas the court was careful to distinguish between prior and subsequent creditors of a mortgagor.

"The prevailing doctrine is that no creditor (at least none whose claim originated before the mortgage was given) can take advantage of the failure to record a chattel mortgage, until he has obtained a lien by legal process. 5 A. & E. Encyclo. of L., 1016; 6 Cyc., 1070. And this rule is recognized in Kansas."

Abernathy *vs.* Madden (Kas.), 139 Pac., 431, 432; 91 Kansas, 809, 810.

In Dixon *vs.* Tyree, 92 Kansas, 137, Tyree executed a chattel mortgage to Moomaw, dated in September, 1911, filed April 2, 1912. March 2, 1912, while Moomaw's mortgage was off record, Dixon loaned Tyree money, taking a chattel mortgage, which he did not record. After Moomaw had taken possession and filed his mortgage, Dixon instituted replevin and prevailed.

"The fact that Moomaw took possession did not strengthen his position. He took possession by virtue of his chattel mortgage only, and this instrument was a nullity as to Dixon. While Moomaw's possession was good against the mortgagor, it was good only by virtue of the right conferred by and the consent expressed in his mortgage, which fell before Dixon's superior right as a subsequent mortgagee in good faith.

"If after Dixon's interest attached the mortgagor had delivered possession to Moomaw, or if the mortgagor had authorized Moomaw to take possession, and possession had followed, Dixon's mortgage would have failed as against Moomaw just as Moomaw's mortgage now fails as against Dixon. By virtue of the new arrangement Moomaw would have become in legal effect a mortgagee in good faith subsequent to the giving of Dixon's mortgage. He would occupy precisely the same position as a third person taking a mortgage in good faith. The same result would have followed if by new consent, or other arrangement with the mortgagor, Moomaw had filed his mortgage for record. In that event Moomaw's right would have dated as if it had originated with the new transaction with the mortgagor, consummated by filing the instrument for record."

"In the present case it may be that substantial justice would have been subserved by upholding the second chattel mortgage. But the general rule that would be established by such a decision here would hamper the operation of the recording act, and might open the door to frequent injustice. The whole question is one of legislative policy, and our statutes seem to have been drawn with a purpose to make the requirement of record especially rigid in the case of chattel mortgages."

Moffatt vs. Beeler, 91 Kansas, 209, 214, 215.

In re Johnson (Okla.), 212 Fed., 311 (Campbell, J.), a statute requiring conditional sale contracts to be recorded, the statute being in the exact words of the Kansas statute was construed. The court said: "The question to be answered, therefore, is whether or not, in order to render the conditional contract of sale void as against the creditors here represented by the trustee, it was necessary for them to have fastened upon the property by attachment, levy, or otherwise prior to the filing of the conditional sale contract. * * *

We conclude that an unfiled conditional-sale contract is, since

the amendment to section 47a (2) of the act, absolutely void as against a trustee in bankruptcy representing creditors who have, subsequent to the execution of the contract and prior to its filing, extended credit to the bankrupt" (212 Fed., 314, 317).

But the *equity* we are asserting in favor of a subsequent creditor is one determinable as a question of general law, upon which a Federal court may adopt its own views.

An equitable right may be enforced in bankruptcy.

Hurley vs. Atchison, etc., Ry. Co., 213 U. S., 126, 134, 135.

The proceedings of the Federal courts "in equity suits, involving equitable rights, cannot be impaired by the local rules of the different States in which they sit. The principles of equity as applied by them are the same everywhere in the United States."

James vs. Gray, 131 Fed., 401.

"The rule is well established that in equitable proceedings, commercial law and general jurisprudence, the Federal courts are not governed by the local laws of the States. Certainly the procedure in bankruptcy is equitable, and a commercial regulation. *Bardes vs. Hawarden Bank*, 178 U. S., 524, 535, 4 Am. B. R., 163, 20 Sup. Ct., 1000, 44 L. Ed., 1175; *Herzikopf C. C. A., 9th Cir.*, 9 Am. B. R., 745, 121 Fed., 544. See article, 15 Am. B. R., 835. The rule is well stated by Judge Putnam in *James vs. Gray* (C. C. A., 1st Cir.), 12 Am. B. R., 573, 131 Fed., 401, 408, 65 C. C. A., 385. In *Kuhn vs. Fairmount Coal Co.*, 215 U. S., 349, 360, Mr. Justice Harlan, relying on *Burgess vs. Seligman*, 107 U. S., 20, 33, lays down four rules by which the Federal courts are guided."

In re O'Callaghan (Olmstead, Referee), 30 Am. B. R., 97, 103.

"Federal courts administer the general law of equity with respect to a subject upon which there is no positive or express rule of local law."

In re Peasley, 137 Fed., 190 (Aldrich, J.).

"We consider that the question is open, and we are therefore at liberty to adopt the construction we believe to be sound and righteous,"

following *Skilton vs. Coddington*, 185 N. Y., 80; 77 N. E., 790; 113 Am. St. Rep., 885.

In re Beckhaus (Ill.), 177 Fed., 141, 146 (January 4, 1910), Baker, J., Grosseup, and Seaman, JJ., concurring.

The Eighth Circuit has spoken in no uncertain tone on the subject now under discussion.

In re Wade, 185 Fed., 664 (Van Valkenburgh, J.), is an exhaustive review of the Missouri and Federal cases in the Eighth Circuit. In the case cited it was held a chattel mortgage dated September 30, 1909, filed for record March 9, 1910, petition in bankruptcy filed July 21, 1910, was void as to those extending credit to the bankrupt after the execution of the mortgage and prior to its recording, notwithstanding no specific lien had been acquired by levy on the property. "As to such creditors the mortgage is absolutely void, and an equity in favor of such creditors is impressed upon the property which follows it into the hands of the trustee in bankruptcy."

In re Bothe, 173 Fed., 597, 599, it was held (Hook, Adams, and Carland, JJ.) a chattel mortgage executed June 2, 1906, was not recorded until June 4, 1907. Held, invalid as to all creditors of the bankrupt who had extended credit between the dates named, although none of them had in that interim levied on the property. The court said: "The trustee in bankruptcy stands for and represents all persons interested in the estate of the bankrupt. In this case * * * he

seeks to assert an *equitable right* in favor of certain special creditors to a part of the bankrupt's estate as against the holder of a chattel mortgage purporting to convey it to one creditor. *The rights of these special creditors rest on the principle of estoppel*, and are no less enforceable in the bankruptcy court than they would have been if they had their origin in written contract. Equitable rights, no less than legal, are there enforced. *Atchison, Topeka & S. F. Ry. Co. vs. Hurley*, 153 Fed., 503; 82 C. C. A., 453; S. C., 213 U. S., 126; 29 Sup. Ct., 466; 53 L. Ed., 729. The mortgagee, Bothe, by leaving the property in the possession of the bankrupt and withholding the mortgage from the record, invited others to deal with the bankrupt on the assumption of the ownership of an unencumbered title to the property conveyed. Whether those so dealing with him were actually deceived or not is immaterial. The inevitable tendency was to mislead and deceive; and the presumption must be indulged that they were misled to their injury. * * *

"As between the mortgagee and those dealing with and extending credit to the mortgagor subsequent to the date of the mortgage and prior to the recording of it, *there is an obvious equity* in favor of the latter."

As to the claim that a subsequent creditor in order to assert this equity must have attached the property prior to the recordation of the mortgage the court said: "We cannot give our assent to this claim. Until this mortgage was recorded it was absolutely void as to these special creditors. Their superior rights arose against the property of their debtor while the mortgage was thus void, and to hold that such rights were lost before they had an opportunity to assert them, before they even knew of the existence of the mortgage is a palpable absurdity. * * * Creditors who extend credit to the mortgagor after the execution of the mortgage and before it is recorded have, as already seen, a *clear equitable right*, inhering in the transaction itself,

superior to the mortgagee, and this right entitles them to relief without the necessity of fixing a lien as a prerequisite."

The court in the case cited (173 Fed., 600, 601) quoted from *First Nat. Bank of Buchanan County vs. Connett*, 142 Fed., 33, 37, where it was held of an instrument not recorded for a period: "Such a mortgage is also utterly void as to simple contract creditors who extended credit after it was given, and who have secured no title or lien by purchase, execution, attachment, or otherwise. As to them, the subsequent recording of the instrument is of no effect" (Hook, J., Sanborn and Adams, JJ., concurring).

In *McElvain vs. Hardesty*, 169 Fed., 31, 33, 34, an agreement in the nature of a chattel mortgage bearing date December 9, 1904, was not recorded until July 7, 1905. Whether the instrument was a chattel mortgage or a conditional sale was held immaterial. "It was clearly one or the other, and in either case the law of Missouri made it invalid and void against creditors of the mortgagor or vendors until recorded or filed in the recorder's office of the county in which the mortgagors or vendors resided. Sections 3404, 3410, 3412, Rev. St. Mo., 1899 (Am. St., 1906, pp. 1936, 1940, 1945). This is particularly true as against subsequent creditors like those represented by the trustee in this case, who incurred their debts on the faith of an apparent unencumbered and unconditional ownership by their debtors of their property."

The *Connett* and *McElvain-Hardesty* cases on other points are approvingly cited in the report of the House and Senate Committee on Judiciary. (See Senate Report No. 691, 61st Congress, p. 9.)

In *Becker vs. Gill*, 206 ^{Fed} ~~Mo~~, 36, a conditional vendor under an unrecorded contract was denied a return of the property as against the claims of subsequent creditors. The ruling was affirmed following the *Connett* case and *McElvain vs. Hardesty*. Judge Hook, speaking for himself

and Judge Sanborn, then ruled: "One other question remains: The trial court, having held the unrecorded contract of conditional sale void as to creditors who became such after it was executed, then ruled that, while appellant might prove its claim as a general creditor, it could not participate equally with them because they, the subsequent creditors, had an equitable lien on the property in question superior to the prior general creditors, and were first entitled to the proceeds. The court followed *In re Wade* (D. C.), 185 Fed., 664, and *Simmons vs. Greer*, 98 C. C. A., 408; 174 Fed., 654. We think the right of the subsequent creditors is merely a defensive one against the holder of the contract of conditional sale who has failed to comply with the registry statute, and that it is not a lien giving them a preference upon distribution in bankruptcy. *It prevents the successful assertion against them of an unrecorded instrument*, but does not in addition confer an affirmative right against others. In such cases the defense against the unrecorded instrument is generally due directly or primarily to the provisions of the statute. *In a broad sense, the statute is founded upon considerations of justice and equity which are recognized and frequently referred to by the courts in construing and applying it*, but it was not intended by such references to give the parties so protected a substantive lien superior to others. If the holder of an unrecorded instrument made no claim on it, but was content to be a general creditor, it would hardly be contended that the subsequent creditors upon discovering its existence could bring it up themselves as grounds for a lien or preference over creditors otherwise of the same class. It does not seem admissible that the existence of such a lien should depend upon the assertion of the unrecorded instrument by the holder and his failure. *Equity has a large place in the administration of the bankruptcy law*, but so far as may be without disturbing positive rights, the dominant note is that 'equality is equity.' "

It is true in Missouri an unrecorded chattel mortgage is invalid as "against any other person" (88 Mo. App., 339), while an unrecorded conditional-sale contract is invalid as against "creditors" (206 Fed., 39). But in *McElvain vs. Hardesty*, *supra*, and *Beeker vs. Gill*, *supra*, unrecorded conditional-sale contracts before the amendment of June 25, 1900, were held invalid as against a trustee in bankruptcy representing subsequent creditors.

But the distinction between "any other person" who may challenge an unrecorded chattel mortgage in Missouri and "a creditor" who may challenge an unrecorded contract of conditional sale is not a distinction *as to the time* when the challenge may be made. It is a distinction (if any) as to the person who may make the challenge.

In *McAttee vs. Shade* (Mo.), 185 Fed., 442 (December 6, 1910), opinion by Reed, J., Sanborn and Adams, JJ., concurring, it was held that a mortgage dated June 28, 1906, not filed until August 8, 1906 (petition in bankruptcy filed October 8, 1906), "would be void as to those creditors, if any, who extended credit to the bankrupt after it was made and before it was recorded."

In *Post vs. Berry* (Iowa), 175 Fed., 564 (January 14, 1910), it was held (Adams, Riner, and W. H. Munger, JJ.): "Any and all creditors of the bankrupt who extended credit to him between the dates of the giving of the mortgages and their filing for record *have an equity* superior to the mortgage whose conduct invited them to trust the mortgagor."

In *re Harnden* (N. M.), 200 Fed., 175 (October 22, 1912), opinion by Pope, J., it was held: "The failure of the bank from March 8, 1911, to May 26, 1911, to record its mortgage operated necessarily to the prejudice of creditors without notice, if any, during that period, and was calculated to entrap parties into extending credit until a record afforded an opportunity to determine the existence of the mortgage. * * * The present mortgage must be declared void as to such creditors" (200 Fed., 180).

"The question to be here decided is essentially one of priority of distribution, rather than one of title" (Rose, J.).

In re Riehl, 200 Fed., 455, 456.

In re Jacobson & Perill (Ga.), 200 Fed., 812 (October 22, 1912), opinion by Newman, J., a mortgage executed June 27, 1911, and not recorded until November 9, 1911, was held invalid as to the creditors who had become such in the interim mentioned, none of whom had fastened a lien upon the property.

The court said:

"Can Goldstein Bros. enforce this mortgage now against these creditors who were thus wrongfully treated in allowing them to sell goods without any knowledge of the existence of the mortgage? The law would work a great wrong if it allowed a mortgagee to stand by silently and let wholesale merchants sell goods to the mortgagor, place their goods in stock, the lien of the mortgage attaching thereto, and then foreclose and sell not only the old goods in stock, but what there may be of the new goods placed in the stock by innocent sellers. The period during which the mortgage was withheld from record was not so long in this case as it was in the case of *Clayton vs. Exchange Bank*, 121 Fed., 630; 57 C. C. A., 656, decided in the Circuit Court of Appeals for this circuit, but the rule there laid down seems to me to be equally applicable here, especially as that is a Georgia case. In concluding the opinion in that case, Judge Shelby says this, speaking of the bankrupt: 'He made new debts for goods, which, when bought, came under the two mortgages, and filed a petition to be adjudged a bankrupt, and on the same day and hour the mortgagee, being notified by telephone, filed the mortgages for record. We cannot avoid the conclusion that this conduct was unfair, unjust, and inequitable to the new creditors of the mortgagor, who were imposed upon by the apparent freedom from liens of all of Josephson's property. It is the peculiar province of courts of equity to grant relief in such cases. In this case it is equitable and just to reduce things to that

condition which the bankrupt and the bank, through its officers, made the new creditors believe really existed, and that is done by denying the mortgages' priority over the debts contracted by Josephson while the mortgages were withheld to give him fictitious credit.' "

In re Cannon (S. C.), 121 Fed., 582 (March 12, 1903), an unrecorded chattel mortgage was held invalid as against creditors who had extended credit after the execution thereof, although prior to the bankruptcy they had not fastened a lien thereon by legal process.

Ruling affirmed in *Simmons vs. Greer* (S. C.), 174 Fed., 654 (November 4, 1909), opinion by Morris, J., Goff, J., concurring.

The rule in Missouri is well settled. In *Landis vs. McDonald*, 88 Mo. App., 335, 338, it is said:

"Manning (the bankrupt) made to defendant a chattel mortgage which was never recorded. Manning remained in possession of the property more than a year when he delivered possession to defendant. That between the time of executing the mortgage and the delivery of possession, Manning's indebtedness to these creditors arose. These creditors had no lien against the property and took no steps to lay hold of the property; they were merely creditors at large.

"The statute, with respect to the recording or taking possession under chattel mortgages does undoubtedly apply to creditors. It applies to them whether they are prior or subsequent creditors. In case of prior creditors, if the mortgage be recorded, or the mortgagee take possession of the property before such creditor obtains a lien thereon or changes position in relation thereto, it validates the mortgage as to him. Such is the extent of the cases of which *Dobyns vs. Meyer*, 95 Mo., 132, is a type. But in case of subsequent creditors, the mortgage is not validated by such registration or possession. The reason for this is founded in common justice, which the statute seeks to secure. The object to be attained by the statute is so apparent, is so well understood and universally

acknowledged, that we need scarcely do more than mention it. Its object is to protect persons dealing with him who claims to be the owner of the property with which he may be dealing, or upon the faith of which others may be dealing with him. It is necessary to the validity of the mortgage that the mortgagee take the possession out of the hands of the mortgagor so that all may see the true situation of the property; or, if he does not so take possession, he must record his mortgage so that all may learn the true situation. So that the statute exactly meets and fully protects one who extends credit to a mortgagor in possession of the property, and the mortgage not recorded. It has been expressly so held under statutes less broad than ours. * * *

"But it is said that the creditors in this case being general creditors, or creditors at large, they cannot invoke the aid or protection of the statute; and that if they could, they have not shown that they were harmed, or that they were deceived by the concealment of the mortgage. We are, however, of the opinion that the statute applies to and protects a general creditor, or, as he is sometimes called, a creditor at large. While it is necessary that the creditor must be prepared to lay hold of the property in specie (such, for instance, as by attachment, or execution under a judgment) when he *comes to enforce* his right; yet, that right may accrue to him as a *mere general creditor*. In discussing this subject, the court of appeals in New York said:

"It is true, the mortgage cannot be legally questioned until the creditor clothes himself with a judgment and execution, or with some legal process against his property; for creditors cannot interfere with the property of their debtor without process. But when they present themselves with their process they may, I think, go back to the origin of their debt, and show, if they can, that when it was contracted, the incumbrance with which they are now confronted existed and was kept secret, by being withheld from the proper officer.' *Thompson vs. Van Vechten*, 27 N. Y., 568, 582; *Stewart vs. Beale*, 7 Hun, 416, affirmed 68 N. Y., 629; *Frazer vs. Gilbert*, 11 Hun, 637. The statute

does not make it a condition to its protection that the creditor must be a specific creditor with process for seizure of the property in his hands.

"The fact that the creditor cannot assail the mortgage until he has seized the property is of no moment in determining whether he belongs to the class of persons as to whom the mortgage is void.' *Bank vs. Oium*, 3 North Dak., 193, 200; *Feary vs. Cummings*, 41 Mich., 383. If he belongs to the statutory class, he may then prepare, or qualify, himself to assert his right by the proper procedure, and when thus prepared with process he may enforce the right which accrued to him as a creditor at large.

"It is held in some jurisdictions that notice to the general subsequent creditor of an unrecorded chattel mortgage before he seizes the property with process will defeat his right to assail it. It is so held in Iowa, but the Federal circuit judge of that State condemns the view as lacking good reason. *Crooks vs. Stuart*, 7 Fed. Rep., 800. And in this State there is a line of authority beginning with *Davis vs. Ownsby*, 14 Mo., 170, down to *Bank vs. Rohrer*, 138 Mo., 383, holding that, as to real estate, 'the title of a *bona fide* purchaser or mortgagee under a deed or mortgage not recorded, is good against creditors at large, and is also good against sales under judgments and executions, if the deed or mortgage is duly recorded before such sales.' But those cases, considered in connection with *Bank vs. Buck*, 123 Mo., 141, and *Bank vs. Newkirk*, 144 Mo., 472, do not affect the question now discussed. For in the latter cases it is held that withholding a mortgage of real estate from record will render the mortgage void as to those extending credit while the mortgage was concealed, if it was withheld with a view to deceive such creditor or has that effect. We, therefore, agree with the view stated in *Crooks vs. Stuart*, *supra*, that it is most unreasonable to allow notice of a concealed mortgage to destroy a right which accrued *after* the harmful act and *before* the notice of it. With regard to the contention that the creditors here did not show that they were harmed or deceived by the concealment, it is our opinion, where one shows that he extended credit to a chattel mortgagor after the execu-

tion of the mortgage, and during the period it was withheld from the record, the mortgage should be declared invalid as to him without an affirmative showing that he was injured or misled. The statute itself avoids the mortgage. Injury and deception will be assumed. It is clear that when one person extends credit to another he supposes that appearances are real and that that other is not making a silent affirmation of a falsehood. 'In business affairs property is a basis of credit. It is a matter of common observation and knowledge that giving a chattel mortgage by a business concern injures its credit.' *Williams vs. Kirk*, 68 Mo. App., 462. In *Hildeburn vs. Brown*, 17 B. Monroe, 779, it was said that the effect of an arrangement to withhold a mortgage of real estate, though it may not have originated in a fraudulent intent 'was to secrete from the public eye the true condition of the debtor and thereby enable him, under the semblance of being the owner of unincumbered real estate, to deceive and mislead other persons by inducing them, upon the faith of his supposed unembarrassed condition, to give him credit which would have otherwise been withheld. Such contrivances or acts, though not designed to perpetrate an actual fraud upon other persons, have an inevitable tendency that way, and are obviously opposed to the general policy of the law requiring the public registration of all liens and incumbrances upon property permitted to be retained and claimed by debtors.' So the Supreme Court of Mississippi, in speaking of an unrecorded mortgage of chattels and real estate, used this language: 'We are of the opinion that the natural and logical effect of the agreement and assignment, and the conduct of the parties thereto was to mislead and deceive the public, and induce credit to be given to Baggett, which he could not have obtained if the truth had been known, and, therefore, the whole scheme was fraudulent as to subsequent creditors, as much so as if it had been contrived with that motive and for that object.' *Hilliard vs. Cagle*, 46 Miss., 309. These cases are quoted with approval by the Supreme Court in *Bank vs. Buck*, *supra*.

"It is not necessary, under the statute aforesaid,

that there be a fraudulent intent or purpose in keeping the mortgage off the record. The statute requires no such condition. But if it did, the intent would be presumed, since, in law, a man is presumed to intend the natural consequence of his act. *Bank vs. Buck*, 123 Mo., 141; *Dry Goods Co. vs. Brown*, 73 Mo. App., 245; *State to use vs. O'Neill*, 151 Mo., 67, 85, 87. 'There are many acts not the result of intentional fraud which the law, nevertheless, *from their tendency to deceive other persons*, or from their injurious consequences to the public, prohibits as being within the same reason and mischief as actual fraud.' *Reed vs. Pelletier*, 28 Mo., 177.

"While much is said in the cases about an *agreement* to withhold the mortgage from record for the *purpose* of giving false credit, yet, in our opinion, it is not necessary in making out the case that it should be shown that there was any agreement, or any purpose. The statute requires no such condition. It is sufficient that the *tendency* and *effect* of so withholding the deed is to induce others to extend credit to the mortgagor. We have just seen that the purpose will follow the act of which it is the natural consequence. And so of the agreement; there cannot possibly be a reason for requiring an agreement to do a wrongful and injurious act. If an act of such nature is committed, its consequences are equally as harmful and against the policy of the law as if it had been agreed upon. We said this much, in effect, in *Williams vs. Kirk*, *supra*, and we are satisfied the logic of the foregoing authorities sustains the position.

"It is of no avail to defendant that he took possession of the goods. The fraud had already been committed and the injury already done; 'taking possession will not nullify or neutralize an actual fraud.' *State to use vs. O'Neill*, 151 Mo., 67, 88. And so we held in *Williams vs. Kirk*, *supra*."

The trustee in bankruptcy was held entitled to recover on proof of circumstances of a preferential nature.

In *Williams vs. Kirk*, 68 Mo. App., 457, 461, a chattel

mortgage withheld from record nine months was filed one day before the levy of an attachment.

"The principle of estoppel *in pais* may be invoked in favor of the creditor and against the mortgagee" (pp. 461, 462).

Speaking of the argument: "that since the creditor is a general creditor, with no rights to any specific property, and since the mortgagee had a right to take security for his claim at any time, and since, in case of a mortgage withheld from record, he does no more by taking possession than he could have done by taking the property in pledge or by a mortgage then executed, no harm could result to the creditor," the court said:

"It seems to us that there is omitted from such argument the whole equity of estoppel *in pais*. Besides it is not always a question, when dealing with a fraud *fensor*, whether his fraudulent conduct has actually, in any given case, worked an injury to the complainant. Furthermore, it must be apparent that he who takes mortgage security, does so for an advantage to himself. He secures an advantage over other creditors. He has a right to this advantage when he pursues a proper course. But if he be allowed this advantage by a deceptive line of conduct—by a concealment—the tendency of which is to deceive and give false credit, he ought to be deprived of such advantage. * * * The tendency and result of permitting acts of this nature are against fair-dealing. It is against the policy of the State as evidenced by the registry acts. When it is so well known that the execution of a chattel mortgage by a trading concern is a matter of alarm to all who have business connections with such institution, who can say that parties who deal with it would have extended credit, if they had known of the mortgage? Every presumption is they would not."

In *Harrison & Calhoun vs. South Carthage Min. Co.*, 95 Mo., 80, 83, a chattel mortgage dated February 27, 1900,

"by neglect * * * was not filed for record until May 15 thereafter." Then followed a judgment and garnishment of mortgagee.

"The question presented is, whether in such circumstances, the mortgage is valid as to plaintiffs (subsequent creditors)? We are of the opinion that it is not.

"* * * it was not necessary for such subsequent creditor to show affirmatively that he was deceived or misled, for the reason that the statute makes no such condition and that it will be so assumed" (citing a number of cases, 95 Mo. App., 84).

"It is the fact of non-recording which avoids the deed" (p. 84).

"It is true that in order to assert his rights, he must have an attachment or execution, or some lien thereon, *but the right accrues to him* when he becomes a creditor during the period the mortgage is withheld from record. When he secures an attachment, execution or other lien, he is in a position to enforce his right as of the day it accrued" (citing a number of cases [New York, North Dakota, Michigan, and New Jersey], 95 Mo. App., 87).

In *Blake vs. Meadows*, 225 Mo., 1, the title to real estate paid for with the money of the wife was taken in the name of the husband. The husband then contracted debts. Then a deed from the husband to the wife was followed within four months by a petition in bankruptcy. A suit was brought by the trustee to set aside the deed "on behalf of those creditors claiming to extend credit on the faith of Meadows' (the husband) ownership of the land." The court said:

"The bankrupt law once for all arrests the individual action of the creditor in the collection of his debt, but it only arrests him, not his rights" (225 Mo., 26).

"Estoppel *in pais* is not the creature of statutory law. It was the creature of refined and elevated ethics administered in a court of equity" (225 Mo., 27).

The case went off on the theory that an estoppel *in pais* could not be asserted against a married woman.

In *Hilliard vs. Cagle*, 46 Miss., 309, 342, the court said:

"The case before us in its leading facts, is like that of *Gill vs. Griffith & Schley*, 2 Mod. Ch., 282. There the question was, whether the mortgagor can keep possession of the goods, retain the conveyance from record for an indefinite period in order to save the mortgagor from the mortification of giving publicity to his embarrassments, and then record and hold the goods as against subsequent creditors. The statement of the proposition seemed so emphatically to indicate what the answer should be, that the chancellor said, 'such certainly should not be the law,' and nothing but controlling authority would induce him so to decide. This judgment, condemning the deed, was affirmed by the Court of Appeals. In that case the same result ensued as evinced in this record (which would have been avoided if the registry laws had been obeyed), to wit: credit upon the faith of property of which the party was ostensibly the owner."

In re Palmer, 218 Fed., 74, it is pointed out in New York, a chattel mortgage delayed in recording is void both as against prior and subsequent creditors, whose rights are assertable by the trustee in bankruptcy.

In re Mission Fixture & Mantel Co., 180 Fed., 263, it was held the same rule prevailed in Washington.

In *Ruggles vs. Cannedy*, 127 Cal., 290, 46 L. R. A., 371, the syllabus reads: "A chattel mortgage withheld from record beyond a time reasonably necessary for its prompt recordation is void as against creditors whose claims have arisen between the date of its execution and the date of its recordation even if they have acquired no lien, under Civil Code, sec. 2957, making the record a condition of the validity of such a mortgage as against creditors." The mortgage in question was dated February 17, 1893; recorded August 26, 1893. Two days later the mortgagor was adjudged insolvent. There were creditors intermediate the execution and

the recording. The mortgage was held void as to them. The opinion is an exhaustive one.

In *Union Nat'l Bank vs. Oium*, 3 N. D., 193, 201, a strong opinion, to be read in its entirety, it is said:

"It would be a gross perversion of the statute requiring chattel mortgages to be filed to assert that the right of this (subsequent) creditor successfully to attack the unfiled mortgage depends on his seizing the property under process before the mortgage is filed" (the case should be read in its entirety).

In *Noyes vs. Brace*, ⁸N. D., 190, a chattel mortgage, dated April 10, 1891, was not filed until September 23, 1893, on which date possession was taken thereunder. Judgments were rendered September 28, 1913, in favor of creditors who became such subsequent to the execution and prior to its recording. As to such creditors, the mortgage was held void in an action in the nature of a creditor's bill.

Skilton vs. Coddington, 185 N. Y., 80; 113 Am. St. Rep., 885, is a leading and much-cited case. It was there held a chattel mortgage under the New York rule, dated October 4, 1897, filed for record October 2, 1902, was void as against the trustee in bankruptcy of the mortgagor.

"With us the (delayed in recording) mortgage is void as to simple contract creditors, but such creditors cannot attack it until the recovery of a judgment and the issue of execution. Then they can seize the mortgaged property whether the mortgagee has filed his mortgage" (185 N. Y., 89).

Quotation was made:

"In *Stephens vs. Perrine*, 143 N. Y., 476; 39 N. E., 11, the mortgagee had obtained possession of the mortgaged property and sold the same prior to the recovery of a judgment by the creditor. Nevertheless, the mortgagee was held liable to account to the creditor for the amount realized from the sale of the property. It was there said by Judge Peckham: 'The mortgage, as to the creditors of the mortgagor, was

always void. * * * The action is against the mortgagee, and I cannot see the force of the reasoning which, while admitting that the mortgage is void as to creditors, nevertheless asserts that a title to the property covered by it may be obtained by the mortgagee by proceedings taken under it, and which asserts the validity of such instrument, provided they are taken before the creditors are armed with a judgment and execution so as to enforce their rights which rest upon the invalidity of the mortgage.' This decision seems to me controlling on the point we are now considering. It is true there is to be found in some cases a statement that the mortgage is void only as to judgment creditors. This statement, if construed in the light of the circumstances of the case before the court and with reference to the context of the opinion, is substantially correct, though not strictly accurate as a general proposition. The question is quite similar to that of the right of an attaching creditor to seize goods fraudulently transferred by his debtor. That he has such right is settled by authority: *Rinchey vs. Stryker*, 28 N. Y., 45; 84 Am. Dec., 324; *Frost vs. Mott*, 34 N. Y., 253; *Hess vs. Hess*, 117 N. Y., 306; 22 N. E., 956. In the first of these cases the same argument was made as is now presented, that the transfer was void only as to judgment creditors, and numerous dicta of eminent judges were quoted in support of that position. This court held that all that was meant by the expression was that a creditor could not attach the fraudulent transfer until he had obtained some process which authorized the seizure of the debtor's property. That is the true interpretation of the dicta relating to unfiled chattel mortgages. The rule that a creditor must first recover a judgment is simply one of procedure, and does not affect the right. Therefore where the recovery of a judgment becomes impracticable, it is not an indispensable requisite to enforcing the rights of the creditor."

Thompson vs. Van Vechten, 27 N. Y., 568 (Denio, C. J.), it is ruled (p. 581):

"When the debt was contracted, Shaw's mortgage was in existence, having been executed the preceding February, but it was not filed until a month afterwards."

The mortgage was held void.

In *Parshall vs. Eggert*, 54 N. Y., 18, 22, it is ruled:

"* * * the time when the creditor became such fixed the rights of the parties."

In *Karst vs. Gane*, 136 N. Y., 316, a mortgage delayed in recording was held invalid as against a creditor whose debt antedated the recording, but who did not acquire a lien until after recording. The case is a leading one and thoroughly reasoned.

The Kentucky cases are mentioned in *Holt vs. Crucible Steel Co.*, 224 U. S., 262. That case involved an unrecorded contract. The trustee in bankruptcy was held not a lien creditor.

In *Baldwin & Co. vs. Crow*, 86 Kentucky, 679, the debt under which levy was made was created prior to the execution of the mortgage.

Wicks Bros. vs. McConnell, 102 Kentucky, 434, presented the instance of an unrecorded mortgage. The date of the levy compared with the date of the recording did not become important, for there was no date of recording.

In *Clift vs. Williams*, 105 Kentucky, 559, the creditors were antecedent the mortgage.

In *Bowles vs. Jones*, 123 Kentucky, 395, the contract of which the attaching creditors took precedence was never recorded. The mortgage of which they took precedence was recorded the day it was executed. The dates are not clearly given, but evidently the mortgage was executed after the attachment, because there was no delay in recording.

Swafford's Admr. vs. Asher (Ky.), 105 S. W., 164, presented an instance of an unrecorded agreement.

Holt vs. Crucible Steel Co., *supra*, concerned itself with the necessity, not the date, of a lien.

In re Ducker (Ky.), 134 Fed., 43 (January 11, 1905), opinion by Severens, J., Lurton and Richards, JJ., concurring, it was held an unrecorded conditional contract was invalid as to creditors who had thereafter extended credit to the bankrupt notwithstanding that prior to the bankruptcy such creditors had not fastened a lien by legal process upon the property. Such creditors were spoken of as having "a priority of right to have recourse against this property * * * as against the mortgagee."

In re Doran, 154 Fed., 467, 471, it is held (Lurton, Severens, and Richards, JJ.):

"But it is contended by counsel for the defendant that the Court of Appeals of Kentucky has construed the statute regarding unfiled mortgages as meaning that, if the mortgagee shall have filed his mortgage before the creditor shall have fastened a lien upon the property by judicial proceedings, his mortgage becomes valid from its date. If the object of the statute is to prevent the creditor from being lured into giving the mortgagor credit upon false appearance of ownership in the one who is about to become his debtor, it becomes practically useless for its purpose, and rather worse than that (for the creditor being directed by the statute to the record office, and finding nothing there, would naturally act upon the assumption that no such mortgage existed), if, after the mischief is done by the creditor's parting with his property, the mortgagee may close the trap by filing his mortgage. Upon such construction the statute, instead of protecting the creditor, is a device for defrauding him. The creditor would in most cases be unaware of his danger until all chance of remedy is gone."

Crucible Steel Co. of America vs. Holt, 174 Fed., 127, 129, 130:

"Since the decision in the *Doran* case, in which we noticed the apparently conflicting cases in the Ken-

tucky reports concerning the effect of the statute above quoted, counsel have discovered a case, marked 'not to be reported,' in 99 S. W., 631; *Besten & Largen vs. People's Mess., etc., Co.*, and they refer to a recent case, *Swafford's Admr. vs. Asher*, 105 S. W., 164, and claim from them it is shown that the Court of Appeals has finally settled the law to be that general creditors who have become such while the mortgage remained unfiled are to be protected. The court below seems to have so held, and some of the language of the judges who delivered opinions in those cases seem to favor that construction. But there was no determination by the court which disposes of the uncertainty we encountered in the *Doran* case, but notwithstanding which we gathered the impression that the trend of the State decisions was against the contention of the trustee. We think we ought not to overrule our decision without a more positive demonstration that the law of Kentucky is to the contrary of what we there held."

In re Atlanta News Pub. Co., 160 Fed., 519, 522 (Newman, J.), the Georgia rule is declared to be: an unrecorded conditional-sale contract is "subject to * * * debts arising from credit given in good faith by reason of the property being in the possession of the vendee with apparent ownership and without any notice of title elsewhere."

To the same effect, *In re Braselton* (Newman, J.), 169 Fed., 960.

In *Williamson vs. New Jersey Southern R. R. Co.*, 29 N. J. Eq., 311, 335, the court said: "Another point made on the argument was, that even if the rolling-stock of a railroad be goods and chattels, and a mortgage thereof be required to be registered or filed by the chattel mortgage act, the complainant having taken actual possession of such property before the judgment of the Lackawanna Iron and Coal Company was recovered, the complainant's mortgage is entitled to priority over the judgment. The mortgage was made on the 14th of September, 1869, and possession of the rolling-stock was not taken by the mortgagee until January 1, 1874. The

mortgage was not accompanied by an immediate delivery of the property mortgaged, but possession was taken before the judgment was recovered."

Conclusion (p. 337): "The complainant's mortgage, so far as concerns the rolling-stock and other personal property subject to it, must be postponed to the judgment of the Lackawanna Coal and Iron Company."

In *Roe vs. Medling*, 53 N. J. Eq., 350, a mortgage dated May 9, 1893, affidavit made May 18, 1913, recorded July 31, 1913, was held void at the instance of a receiver appointed August 1, 1913. "The mortgage of the appellants was not recorded as prescribed by the act of 1885, and it is, therefore, subsequent and subject to the claims of all persons who became creditors of the mortgagor before the mortgage was recorded, but is prior to the claims of all those who became creditors after it was recorded." In that State no differentiation is made between prior and intermediate creditors.

"Where credit was extended to the mortgagor it has been held that the mortgage is void alike as to creditors with or without liens" (6 Cyc., 1071).

In *Sanger vs. Guenther*, 73 Wis., 354, a mortgage executed May 10, 1884, was not recorded until November 12, 1884. Mortgagor executed note June 16, 1884; judgment rendered March 26, 1885; garnishment served on mortgagee December 2, 1886. The court quoted the head-note from *Standard Paper Co. vs. Guenther*, 67 Wis., 101:

"When the mortgagee of chattels delays the filing of his mortgage at the request of the mortgagor and in order that the credit of the latter may not be injured, he is estopped to assert such mortgage as against creditors who, after the execution of the mortgage and before its filing, gave credit to the mortgagor upon the faith that his property was unincumbered; and this is so although the mortgagee had no actual intent to defraud any creditor."

No contention was made, the judgment was not recovered nor lien created by the creditor prior to the recording.

XIII.

In construing the contract in issue in this case the court is reminded that in the petition of intervention the execution of certain promissory notes is alleged (Rec., 5). These notes are set out in the record at pages 15 and 16. The notes are negotiable in form. There is no reference in the body of the notes to any extraneous contract nor any recital that the consideration of the notes is a contract of conditional sale.

The petition in bankruptcy was filed July 11, 1912 (p. 3). One of the notes did not mature until July 20, 1912, and one not until August 20, 1912 (p. 16).

It is well settled that a note, negotiable in form, imports a consideration, and that in an action on the note itself evidence of an extraneous contract whereby the obligation to pay the note becomes uncertain is not admissible. In other words, having taken negotiable promissory notes which in and of themselves have no reference to the contract, it is clear that the seller elected to make the obligation of the purchaser to pay the notes absolute.

In *Babbitt vs. Moore* (N. J.), 17 Atlantic, 99, 102, it is held that:

"Where a promissory note is given pursuant to the expressed terms of a contemporaneous written agreement, * * * the note is so intimately connected with the contemporaneous writing, that together they constituted the contract sued upon."

In this case the nature of the obligation of the purchaser, as set out in the contract, is not absolute.

The record in this case discloses that the total contract price was \$5,940, payable \$2,500 on the delivery of the apparatus and the balance in promissory notes falling due at intervals (Rec., p. 4).

The intervening petition admits that the initial sum of

\$2,500 was paid, and also the further sum of \$700.14; so that the intervener received in all \$3,214.14. The bankrupts' predecessor in title executed those promissory notes to the order of the intervener (Rec., pp. 15, 16). These notes are negotiable in form, and do not, on their face or otherwise, refer in any way to the contract in connection with which they were executed.

There was no provision in the contract in this case, as in *Harkness vs. Russell*, 118 U. S., —, that the money paid on the notes should be treated as compensation for the use or rental of the machinery; nor is there any express covenant that in the event of a retaking of the property, the seller is entitled to retain the payments theretofore made. On the contrary, the contract specifically provides that in the event the seller retakes same, the purchaser shall pay:

1. The expenses incurred by the seller under the contract.
2. The damages arising from the wear and tear of the machinery, apparatus, or plant.
3. A rental for the machinery, apparatus, or plant, "which said rental is hereby fixed and agreed to be 6 per cent per annum upon the total purchase price herein agreed to be paid, and to be calculated from the date when the machinery, apparatus, or plant herein contracted for is erected ready to charge."
4. The damage to the machinery, apparatus, or plant which might be occasioned by the negligence, carelessness, or abuse thereof by the purchaser, his representatives or employees (Rec., p. 14).

In the authorities cited in that portion of this brief, *supra*, dealing with the question that the agreement that the purchaser should have the right to file a mechanic's lien operated to make the obligation of the purchaser to pay the price absolute, it is shown that on the retaking of machinery sold under a conditional sale the obligation of the purchaser to pay the purchase price is at an end.

In the taking of notes negotiable in form, which (to use the language of an English judge) are

“couriers without luggage whose only passport are their countenance,”

it is clear that the seller intended to make the obligation of the purchaser to pay absolute, thereby negating any idea of a conditional sale.

In *Chicago Railway Equipment Company vs. Merchants Bank*, 136 U. S., 268, the suit was defended upon the ground that the instruments declared on were not negotiable promissory notes.

“Are the writings in suit to be regarded as promissory notes, to be protected in the hands of *bona fide* holders for value, according to the rules of general mercantile law as applicable to negotiable instruments, or are they anything more than simple contracts, subject, in the hands of transferees, to such equities and defenses as would be available between the original parties?” (page 275).

“The defendant insists that in view of the agreement for the retention by the payee of the title to the cars till all the notes of the same series, principal and interest, are fully paid, the transaction was only a conditional sale of the cars. It is contended that the promise to pay the notes given for the price, so far from being absolute as required by the mercantile law, is subject to the condition, running with the notes, that the title to the cars should not pass until all the notes were paid, which could not occur if, before payment, the cars had been destroyed or sold to other parties.”

In that case the negotiability of the note was upheld on the ground that the instrument was, in effect, a chattel mortgage.

“The agreement that the title should remain in the payee until the notes were paid * * * is a short form of chattel mortgage” (page 283).

In *Killam vs. Schoeps*, 26 Kansas, 310, a note on its face one of conditional sale was held non-negotiable (*Brewer, J.*).

"Whenever any stipulation concerning other matters than the payment of money is incorporated in one instrument with a promise to pay money, such double contract will not be adjudged a negotiable paper."

Citing

1 Daniel Neg. Instr., section 59.

South Bend Iron Works *vs.* Paddock, 37 Kansas, 510, 512.

In *Choate vs. Stevens*, — Michigan, —; 43 L. R. A.²⁷⁷ it was held, on the ground the title was reserved by way of security, that the negotiability of a note is not destroyed by a clause stating that it is given for certain property, the title to which shall not pass until the note is paid, and it is subject to be retaken in case of non-payment of the note. In that case the agreement with respect to the retention of title was contained in the body of the note itself. The court cited with approval *Chicago R. Equipment Co. vs. Merchants Bank*, 136 U. S., 286, and said:

"If we can place this construction on the transaction, *i. e.*, that it was a sale, there is no difficulty in sustaining the negotiability of this note under our own decisions. * * * If we were to consider the provisions of this contract, we should not hesitate to say that this was a sale with a reservation of title by way of security."

²⁷⁷

In a note to that case, 43 L. R. A.²⁷⁸ it is said:

"So far as the rule can be regarded as settled by the authority, it seems to be that if there is nothing more in the transaction than a retention of title to the property *as security*, so that the absolute liability of the note is not affected, the note is negotiable."

In *Sloan vs. McCarty*, 134 Mass., 245, 246, it is said:

"The contract contemplates that the payment of the money by the defendant, and the transfer of title to the horse from the plaintiff, should be simultaneous acts; and if the horse should die, for example, within the month, without fault on the part of the defendant, the plaintiff would be disabled from transferring the title, and could not maintain an action on the contract. * * * The contract is something more than a promise to pay money, and the promise to pay money is not a promise to pay it absolutely and at all events; and, therefore, the contract is not a promissory note."

In *Wright vs. Traver*, 73 Mich., 493, an instrument provides:

"The conditions of this note are, if not paid when due, the property for which it is given shall be the property of A. J. Mowry, the payee in the note."

The court said:

"No one can tell from a reading of this instrument whether the payment therein mentioned is certain and unconditional or not. The maker could not have intended that if he failed to pay on or before the day therein named, he should lose the property, and also have the payment of the whole sum enforced against him. The instrument is uncertain, and capable of two constructions as to its terms. The court erred in calling it a promissory note."

In *Bannister vs. Rouse*, 44 Mich., 428, it was held (Marston, Graves, Cooley, and Campbell, J.J.):

"It was provided in each one (of the instruments sued on), that the piano should remain the property of Bullock, the payee, until the payment, and that in case of default in payment, it should be optional with him to take possession of the piano, or collect the note."

(It has already been pointed out that, where the conditional seller takes possession of the property in question, he cannot thereafter collect the unpaid balance due on the purchase price.)

"The money was not, therefore, made payable absolutely and at all events. * * * In case of failure to make payment by the day, whether voluntary or otherwise, the agreement became one entitling the payee to demand the piano instead of the money, and this takes place at the moment the right of action arrives. * * * It seems to me to be wanting in that certainty which the law of merchant deems necessary to give it currency according to commercial usage."

In *Worden Grocer Co. vs. Blanding*, 161 Mich., 254, it is held:

"The note in question contains the entire contract of the parties, and it is obvious, from a consideration of its terms, that it presents the ordinary kind of conditional sale, in which the title never passed to the defendants, and not a completed sale with a reservation of title intended by way of security only. * * * The precise question involved here was before the Supreme Judicial Court of Massachusetts, when it was held that an instrument otherwise than a promissory note was converted into a mere contract by the condition, 'said horse to be and remain the entire and absolute property of the said Sloan, until paid for in full by me.' *Sloan vs. McCarty*, 134 Mass., 245. We are of the opinion, therefore, that the court did not err in treating the instrument in question as non-negotiable."

The case of *Choate vs. Stevens*, 116 Mich., 24, is distinguished in *Worden Grocery Co. vs. Blanding*, 161 Mich., 254. It is pointed out:

"The case of *Choate vs. Stevens* was held to present a case of a completed sale, with reservation of title by way of security only,"

and in this respect different from "the ordinary case of conditional sale, in which the title never passed to the defendants."

As applied to the case at bar, the doctrine of these two cases may be thus stated: If the obligation to pay is to be deemed absolute (the notes given by Grant being negotiable instruments), it can only be on the basis that the title is held by way of security, thus converting the instrument in question in this case into a completed sale, with reservation of title by way of security; but notes on their face create an absolute obligation to pay, thus negating the idea of a conditional sale.

"A promissory note is defined to be: 'An unconditional promise, in writing, for the payment of a certain sum of money, absolutely' (3 Kent, Comm., 74; Daniel, Neg. Instr., sec. 28)."

Bick vs. Clark, 134 Mo. App., 544, 546.

In *Third National Bank vs. Armstrong*, 25 Minn., 530, 533, it is said:

"Defendant's promise, therefore, was not an absolute and unconditional one to be kept in any event; for it depended upon the contingency of the observation by the company of the sole condition upon which it rests, that an absolute transfer of the property, with good title, would be made whenever the promise was performed. The promise of payment and the implied obligation to transfer the title were mutual, and as each was the sole consideration for the other, and both were to be performed at the same time, they were concurrent conditions of the same agreement, in the nature of mutual conditions precedent, so that the inability or refusal to perform the one would excuse the performance as to the other. *Benjamin on Sales*, 451, 480. If prior to any default on the part of the defendant, the company had the right to take possession of the property and dispose of it, so that upon maturity, the defendant's obligation and observation of the condition on its part had become im-

possible, there can be no doubt that under such circumstances, no action could have been maintained against him upon his promise. An obligation of this character is altogether too uncertain to serve the purpose of commercial paper, as the representative of money in business transactions."

In *Overton vs. Tyler*, 3 Barr (Pa.), 346, Chief Justice Gibson said:

"A negotiable bill or note is a courier without luggage. It is a requisite to be framed in the fewest possible words, and those importing the most certain and precise contracts. * * * To be within the statute, it must be free from contingencies, or conditions that would embarrass it in its course; for memorandum to control it, though endorsed on it, would be incorporated with it and destroy it."

In *First Nat'l Bank vs. Greenville Nat'l Bank*, 84 Texas, 40, 43, it is said:

"A paper to be entitled to the force and effect which paper of these classes have (that is promissory notes), whether negotiable or non-negotiable, must contain a promise 'in writing, by one person, to pay to another person therein named, or to his order, or to bearer, a specified sum of money, absolutely and at all events.' Daniel on Negotiable Instruments, 28. A paper not having these characteristics cannot be a certificate of deposit or a promissory note. * * * In determining whether a paper is negotiable, it alone can be looked to; for it is to that alone which persons dealing with it must have, and have the right to look."

In *Schmidt vs. Pagg*, Mich., 137 N. W., 524, notes given after the delivery of the property were held to create "a sale, with reservation of title by way of security only."

This case is especially pertinent in the case at bar. The notes bear date February 1, 1912 (Rec., 1516). The petition pleads the notes were executed "under date of February 1, 1912" (Rec., 5).

The referee found as a fact "that the first shipment of machinery arrived on November 15, 1911, and the second shipment arrived on November 20, 1911" (Rec., 21).

In *Bank of Webster vs. Alton*, 60 Conn., 402, 407, the court said: "The plaintiffs' counsel in their brief, say that the essential question in this case is, whether the instrument in suit is a promissory note; and in this statement we concur.

* * * A promissory note is a promise to pay money * * * absolutely and at all events. Is there a promise to pay 'absolutely and at all events.' We think not. The transaction * * * is * * * conditional sale, or in other words an executory contract for sale." It was held that, as "it does not appear upon the face of the instrument in suit that the maker's promise will at any time be absolutely enforceable," the instrument was not negotiable.

"Such (commercial) paper is, as Mr. Daniels says, like currency of the country, a circulating credit, and before maturity the genuineness and solvency of the parties are alone to be considered in determining its value, and it has been fitly termed 'a courier without luggage.'"

1 Dan. Neg. Inst., sec. 1.

In 1 Daniel on Neg. Instr. (6th ed.), sec. 28, it is said: "A promissory note, or note in hand, as it is often called, is an open promise in writing by one person to pay another person therein named, or to his order, or to bearer a specified sum of money *absolutely and in all events*."

In section 30 the author says: "In order to fulfill the definition given, the paper must carry its full history upon its face, and embrace the following requisites: * * * Second. The engagement to pay must be certain. Third. The time of payment must be certain."

In section 41: "The instrument must be payable unconditionally, and, in all events, in order to be negotiable."

In section 52: "Wherein in a note the obligation to pay is not limited or contingent, but is absolute and unequivocal,

the character of the note as a negotiable instrument is not affected by a recital therein that it was given for an amount due by the makers for goods furnished by the payee upon a reservation of title as being a conditional sale."

In section 80: "It is a general principle of law that parole evidence is inadmissible to vary or contradict a written contract. Therefore if a bill or note be absolute upon its face, no evidence of a verbal agreement made at the same time, qualifying its terms, can be admitted."

In Bigelow on Bills, Notes and Checques (2d ed.), page 29, section 5, it is said: "The sum payable must be certain."

At page 32 it is said: "It is an invariable rule, or a rule with at most but a single exception, that the promise or order must be absolute. * * * It is fatal to the contract as a contract of law merchant that when the promise or order was made, payment was dependent upon condition or contingency."

At page 33 it is said: "It will not affect the instrument under the law merchant that language is added to it, provided the additional language does not make the promise or order conditional or contingent."

At page 35: "The promise or order is not performable absolutely if the time of payment is not certain to come to pass."

At page 36 it is said: "All that the law requires is that the time of payment shall be sure to arrive."

At page 40: "The contract of the maker of a promissory note differs in one respect from that of any other party to a contract of law merchant; the writing itself shows, apart from grace, what the contract, in terms, is."

7 Cyc., page 532: "A promissory note, or as it is frequently called, a note of hand, is a written promise by one person to pay to another person therein named, or order, a fixed sum of money, at all events, and at a time specified therein, or at a time which must certainly arrive."

In a note a number of authorities are quoted in support of the definition given.

At page 597: "If the time for payment is contingent or conditional, the paper will be non-negotiable."

In Eaton & Gilbert on Com. Paper, page 175: "One of the essentials of the negotiability of a bill or note is that it contain an unconditional promise or order to pay a sum certain in money. To render a bill or note negotiable it must be payable at all events and cannot be dependent upon contingency."

In that work the negotiable-instrument law is printed, and at page 656, section 20, it is stated: "An instrument to be negotiable must conform to the following requirements: 2. Must contain an unconditional promise or order to pay a sum certain in money."

In section 24 it is said: "The negotiable character of an instrument otherwise negotiable is not affected by a provision: 4. Which gives the holder *an election* to require something to be done in lieu of payment of money."

We quote from an authority not at this writing accessible:

"It has elsewhere been also well said, that negotiable paper carries on its face its own history, so that nothing can be alleged against it, while it continues in circulation and undishonored as against an innocent purchaser, other than what is there apparent. 'The policy of the law, in reference to commercial paper, requires that it shall tell its own story, and have effect, in the hands of innocent holders for value, according to what appears on it.' *Schneider vs. Schiffman*, 20 Mo., 571."

XIV.

The judgment of the Court of Appeals, from which an appeal was taken in the case at bar, operated as a return of the "machinery in controversy" to the conditional seller without requiring anything at the hands of the conditional seller.

It will be recalled a court of bankruptcy administers jurisprudence on principles of equity, and that

"he who seeks equity, must do equity."

The total purchase price of the machinery, as stated in the petition of intervention, was \$5,940 (Rec., 4). Of this price \$3,214 in all was paid. The order of the court operates as a return of the machinery without taking into consideration the payments made by the purchaser.

The contract (Rec., 7) required many things to be done by the purchaser. In ordering a return of the machinery the Court of Appeals did not take these things into consideration, nor differentiate between the things furnished by the seller and the things furnished by the purchaser. The order of the Court of Appeals is open to the interpretation that all of the machinery, including all done in and about it by the purchaser, is absolutely returnable to the seller.

But in the contract itself it is especially provided (Rec., p. 14) that if the seller by reason of the default of the purchaser retakes the machinery, then the purchaser shall pay the seller:

(a) "All expenses incurred by the party of the first part under this contract, and for all damages to the party of the first part arising from the wear and tear of the said machinery, apparatus or plant;

(b) "and such further sum as will reasonably compensate the party of the first part for the use or rental by the party of the second part of the said machinery, apparatus or plant, which said rental is hereby fixed and agreed to be six per cent per annum upon the total purchase price herein agreed to be paid, and to be calculated from the date when the machinery, apparatus or plant herein contracted for is erected, ready to charge."

The petition in intervention pleads that the machinery was installed February 3, 1912. No computation of interest at the rate of six per cent per annum on \$5,940 to the date the machinery is to be surrendered to the purchaser was made or ordered to be made. There is no allegation that any damage to the machinery was sustained, nor is there any evidence of damage.

It is respectfully submitted, if the machinery is to be returned at all, there should be an accounting as between the seller and the purchaser according to principles of equity and the terms of the contract between the parties.

In considering the question outlined in this phase of the case regard must be had to the decision in *Harkness vs. Russell*,¹ 18 U. S., 663. In that case it was provided that if the conditional vendor retake the property and sell the same and the vendee agree "to pay on the note any balance due thereon after such endorsement, as damages and rental for said machinery" (page 665). The court said:

"This stipulation was strictly in accordance with the rule of damages in such cases. Upon an agreement to sell, if the purchaser fails to execute his contract, the true measure of damages for its breach is the difference between the price of the goods agreed on and their value at the time of the breach or trial, which may fairly be stipulated to be the price they bring on a resale" (page 667).

In the case at bar the contract contains no such stipulation. It is specifically provided that if the vendor retake the machinery for a non-payment of the purchase price, the vendor is to be paid the expense incurred by him under the contract for all damages arising from the wear and tear of the property, also a rental fixed at 6 per cent per annum upon the total purchase price, and all damages to the property occasioned by the vendee or any one representing him or in his employ.

The only Kansas case on the subject which counsel have been able to find is *Fleck vs. Warner*, 25 Kansas, 492. That case is cited in some of the text-books as authority for the proposition that on a retaking of the property by the conditional vendor the vendee forfeits all of the payments theretofore made on the purchase price. But an attentive reading of the case will disclose this is not an accurate statement of

what is therein decided. The action was in form replevin. The court was careful to say :

“Whether the defendant should ever receive anything back, or should be paid anything for what he had already paid to the plaintiff, is a question for further consideration. * * * Whether the plaintiff held this title and the right of possession merely as security for the amount of the debt which the defendant still owed the plaintiff, or whether the property became absolutely the plaintiff's, and the debt from the defendant to the plaintiff became canceled and extinguished, it is not necessary for us now to decide; and whether the plaintiff then owed, or now owes, the defendant anything for what the defendant paid the plaintiff, it is not necessary now to determine.”

Hence under the decision of this court and of the Supreme Court of Kansas the question whether, in the absence of a stipulation to the contrary, the vendee remains liable for the unpaid portion of the purchase price, notwithstanding the fact that the vendor has retaken the property, may be considered one to be decided by this court on principle and authority, excepting only in so far as it may have been passed upon in *Segrist vs. Crabtree*, 131 U. S., 287, 292.

In *Snook vs. Raglan*, 84 Georgia, 251, it was held:

“One who sells personal chattels, such as household furniture, upon what is called the installment plan, reserving title in himself until the last of the purchase money is paid, when he takes back furniture into his own possession because the balance of the purchase money is not paid, is held in law to have rescinded the contract *in toto*. So far as the duty on the part of the purchaser to pay any more in the future is concerned, and the right of the purchaser to have back what has been paid in the past, it is as if no contract of purchase and sale had ever been entered into.”

In *Hays vs. Jordan*, 85 Georgia, 741, 749, it is said:

"In a sale reserving title until the price is paid, many of the cases hold that partial payments are forfeited on default of the residue; but in courts possessing equity powers, the modern tendency is to allow the seller, who rescinds a contract for default after receiving part of the price, to retain only so much as will compensate him. Newmark on Sales, section 306; *Preston vs. Whitney*, 23 Michigan, 260, 267; *Johnson vs. Whittemore*, 27 Michigan, 463, 470. * * * We think that under our law, the court should have instructed the jury to so form their verdict as to do justice to all parties; and should have instructed them that if the plaintiffs elected to take the specified property, and a part of the purchase money had been paid, the plaintiffs are entitled to recover the property itself, but before they could recover, they must return the money which the defendant had paid them, after deducting the proper amount for the use of the piano, if the use was of any value to the defendant."

In *Schafer vs. Russell*, 28 Utah, 444, the court ruled *it was proper to refuse an instruction* to the effect that—

"Where the chattels are sold to a vendee on condition that the title to said property is not to pass to the vendee until the purchase price is fully paid, that all payments made, whether in property or money, prior to the default of the vendee, become forfeited to the vendor" (28 Utah, 454).

In *Hine vs. Roberts*, 48 Conn., 267, it is said:

"The plaintiff now insists that the defendant shall not only forfeit the melodeon, but shall also pay the note. * * * It is apparent that the consideration for the note was not the mere abstract right to pay for and receive title to the organ. * * * but it was the actual purchase and the acquisition of title as an accomplished fact * * * the purchase failed, the title did not pass, the plaintiff received the melodeon

and the return of the organ in good condition;
 * * * *there was therefore an entire failure of the consideration for the note."*

In *Hamilton vs. Hilands*, 144 North Carolina, 279; 56 Southeastern, 929, the contract in question was held to be one of conditional sale. The court said:

"The defendant has the right to redeem the property by paying the amount due, with interest and costs, and in default of such payment to have the property sold and the proceeds applied to the payment of the debt and interest thereon, and the costs and the surplus, if any, paid to him, thus treating the contract as in equity a mortgage."

In *Ross & Meehan Brake Shoe Foundry vs. Pascagoula Ice Company*, 72 Miss., 608, an ice machine was sold under a contract of retention of title (page 613). A note was given for the purchase price (page 614). The court said:

"The right of the seller of personal property to make a conditional sale thereof, reserving title until payment of the purchase price, is too firmly settled in this State to admit of controversy. * . * But the reservation of this right is but security for the purchase price, and if the property is recovered by the seller, he must deal with it as security and with reference to the equitable rights of the purchaser."

In *Duncan vs. Stone*, 45 Vt., 118, the defendant, a constable, attached property in the possession of a conditional vendee. The wagon was stolen from the possession of the constable. The value of the wagon was in excess of the unpaid balance of the purchase money. The conditional vendor sued the constable in trover. The court said:

"The plaintiffs' right of recovery represents the interest of the vendees, as well as that of themselves, on account of the liability over, and these interests are the whole estate in the property; the plaintiffs, therefore, are entitled in this action to recover the full value

of the property. * * * *What they recover in this action, they will hold in lieu of the property, subject to the same rights.* The plaintiffs having right of action, and having commenced an action for the taking by the defendant, *the vendee* could have had no action in his own behalf against the defendant for the same taking, but *has his remedy by way of liability of the plaintiffs over to him, after recovery by the plaintiffs*" (45 Vt., 124).

Thus clearly recognizing the conditional vendee having paid a part of the purchase price, has an interest in the property thus sold.

In *Drew vs. Pedlar*, 87 California, 443; 22 American State Report, 257, it is stated in the syllabus:

"On the rescission of a contract of sale for the failure of the purchaser to pay the balance of the purchase price, he is entitled to recover of the vendor all the moneys paid by him on account of the purchase, less such actual damages as may have been sustained by the vendor from the vendee's breach of contract."

It appeared in the course of the opinion that plaintiff, a purchaser of real estate under an executory contract, failed to make a payment on or before the time fixed in the agreement and did not tender payment thereof until some time thereafter. Thereupon the defendants (sellers) refused to accept the payment and execute a deed. The defendants "say in their answer that, upon the failure of plaintiff to pay, according to the terms of the contract, they treated the contract as abandoned and nullified by plaintiff and the one thousand dollars paid as forfeited. * * * Under these circumstances the plaintiff (the purchaser) was entitled to recover the one thousand dollars paid by him, less such actual damages as may have been sustained by the defendants (the sellers) by plaintiff's breach of the contract."

Tufts vs. D'Arcambal, 85 Michigan, 185; 24 American

State Report, 79, is seemingly to the contrary, but it will be recalled that action was in form replevin, and not a suit in equity.

In *Dederick vs. Wolfe*, 68 Mississippi, 500; 24 American State Report, 283, the purchasers obligated themselves to pay the purchase price absolutely, and at all events, and were to have possession and use of the article named until full payment of the price, or until deprived of it by the act of the seller for his own security, "the title remaining in him until full payment of the agreed price, and any payment made before resumption of possession should be considered as payment for use, but nothing 'shall constitute a defense or offset, or delay prompt payment of this note in full at maturity.'"

* * * The transaction was plainly a sale, with reservation of title as security for the price, and resorting to the price as means of securing payment of the note was in pursuance of the contract, and did not preclude the recovery of the note, which, by its terms and the superadded stipulation was to be paid at all events and without defense."

The court said:

"The other view does justice to both parties, according to the contract, by allowing the seller what he was promised, and the buyer what was purchased and treating the price, as it was intended to be, as security for the payment of the stipulated price."

It will be recalled in the case at bar the decision of the Circuit Court of Appeals proceeding on the theory, not that the title was retained as security for the payment of the purchase price, but that the title was retained and never to pass unless and until the purchase price was paid in full. If the contract in question in the case at bar is construed as a retention of title by way of security, then it is clear that as between the parties to the transaction the contract was in effect a chattel mortgage.

In *Perkins vs. Grobben*, 116 Michigan, 172; 72 American State Report, 512, 518, it is said:

"The vendor is not entitled to the title and possession of the property, and to be paid for it also."

In *Barton vs. Mulvane*, 59 Kansas, 313, the defendant Barton purchased two boilers. "Only a small part of the purchase price was paid, and for the balance due" notes were given. "Concurrent with the execution of the notes a contract was made and signed by both the Bartons, acknowledging that they were indebted on the boilers to the amount of six thousand dollars, and agreeing that the boiler company should retain, as security for the payment of the notes, the ownership and title of the boilers, and that if the debt was not paid when due the possession of the boilers might be taken by the boiler company." A portion of the notes was paid and default was made in the remaining portion. An action in replevin was brought to recover the boilers. The plaintiff recovered the possession of the boilers, together with "the reasonable value of their use from the time of the demand or commencement of the action until the time of trial." It was contended on appeal that the plaintiff was not entitled to recover the usable value, but was confined to the interest upon the debt. He did not sue upon the debt, but for the possession of the property, to which he was entitled under the law. The court said:

"The value of the property, together with the damages allowed for the use of the same, do not equal the amount of the indebtedness for which the boilers stood as security. There was therefore no declaration or unauthorized award of damages."

In *Aultman vs. Olson*, 43 Minnesota, 409 (Mitchell, J.), it was held following *Minneapolis Harvester Works vs. Hally*, 27 Minnesota, 495, that the property which was the express consideration for the instrument sued on, having been taken from the possession of the defendant by the plaintiff and sold, there was a total failure of consideration, and, therefore, the action on the instrument for the price of the property could not be maintained.

The conditional vendor "had the right, upon the default of the purchaser, to take and keep it (the property) as its own, without selling it or applying the proceeds of it to pay the vendor's debt, and the legal effect of that taking, under the established rule of property in Minnesota, *would be to annul the obligation to pay the agreed price of the property taken*" (156 Fed., 549).

In *Earle vs. Robinson*, 30 N. Y. Supp., 178, the syllabus is to the effect:

"Where goods are sold on condition that they shall remain the property of the seller until paid for, seizure of them for breach of condition extinguishes the *buyer's liability on purchase-money notes.*"

In *White vs. A. W. Gray's Sons*, 89 N. Y. Supp., 481, it is said:

"A vendor under a conditional sale cannot have both the property and the purchase price. Where he has elected to retake the property absolutely, the consideration for obligations or security given for the purchase price fails, and he can neither collect upon the one nor enforce payment of the other."

In *Loomis vs. Bragg*, 50 Conn., 228, a conditional sale vendor was denied a recovery against a vendee for the balance remaining unpaid on the purchase price, the vendor having retaken the property sold.

"The better rule, however, seems to be that in reclaiming property, the seller rescinds the contract of sale in so far as it has been executed, and is therefore bound to restore to the buyer anything that he may have received by way of payment. * * * The rule refers only to money and property given in payment for the property purchased, as to which the seller ought to put the buyer in the position he held when the contract was made."

Latham vs. Davis, 44 Fed. Rep., 862, 862 (Hallett, J.), citing *Hamilton vs. Manufacturing Co.*, 54 Ill., 371; *Hine vs. Roberts*, 48 Conn., 268; *Preston vs. Whitney*, 23 Mich., 260.

In *Cole vs. Hines*, 32 L. R. A., 460, there is a note on the right of the purchaser to recover payments where the vendor took the property from his possession.

The following cases are cited in favor of the proposition that the seller must refund to the buyer the purchase price received, less a deduction of such amount as may be equitably due the seller for a depreciation in the value and the use of the property.

Hays vs. Jordan, ⁸⁵ 34 Georgia, 741; 9 L. R. A., 373.
Puffer vs. Lucas, 112 N. C., 377; 19 L. R. A., 682.

At 32 L. R. A., 469, it is said:

"The purchaser did not forfeit the money, too, where the contract did not so provide. *Miller vs. Steen*, 30 California, 402; 89 Am. Dec., 124."

Cole vs. Hines, 81 Md., 476, is also reported, 32 L. R. A., 455. There is an extensive note on the subject of conditional sales. It is said:

"There appears to be conflict of authority in regard to the right of the vendor to collect the purchase money after retaking the property under a contract of conditional sale, reserving title until payment in full. Where the retaking is construed to be a rescission, his right to enforce payment is gone. * * * Some cases hold that an election of one remedy precludes all other; some hold that the consideration has failed and some deny the cumulative right by the terms of the contract. But other cases hold that the remedies are not inconsistent and that obtaining possession by a judgment, levy and sale, or by a resale or notice after taking by replevin, or by taking under the contract, will not prevent the vendor from collecting the balance. This is a construction that the retaking is the enforcement of the security.

"If there is a small part of the debt due and the property is valuable, it seems that the inclination of the courts is to relieve the purchaser from the entire loss of his investment."

"It appeared that the plaintiff had sold the defendant articles of personal property, and that a note was given to him by the defendant for the purchase money, in which title was reserved in the seller until the money was fully paid. When the plaintiff elected to bring a suit in trover for the recovery of the property, this was in effect a rescission of the contract contained in the note."

Moultrie Repair Co. *vs.* Hill, 120 Ga., 730, 732.

"The contract * * * was a clear sale and purchase of the piano at a fixed price. * * * The title was retained by the vendor until the purchase money was paid. * * * If the purchaser had paid any portion of the purchase money, his interest in the property would enable him to resort to a court of equity * * * for adjustment relative to the rights of the parties."

Magher *vs.* Hollenberg, 9 Lea (Tenn.), 392, 395.

In Hill *vs.* Townsend, 69 Ala., 286, 288, 292, it was held the following instruction was properly given:

"The law does not favor a forfeiture of contract, by which a party to that contract loses the benefit of all the payments he has made upon the contract in the purchase of the property, and also loses all interest in the property by such forfeiture, when such forfeiture is claimed upon the failure of such party to pay any one of a series of installments for the purchase money of such property; and to authorize or sustain such claim of forfeiture, it must be provided for by the contract as made between the parties."

"When personal property is sold, and the seller retains the title as security for his purchase money, and the indebtedness matures in installments, he may proceed to rescind the sale and recover possession of the property as soon as any of the installments become due and unpaid. * * * Of course, the seller, upon rescinding, would be liable to account equitably for whatever sum the payments made by the purchaser might exceed the hire of the property."

Scott *vs.* Grover, 7 Ga. App., 182, 183.

XV.

There is an obvious error appearing on the face of the record to which the attention of the court is called:

"That to condemn without a hearing is repugnant to the due-process clause of the Fourteenth Amendment, needs nothing but statement."

Riverside Mills *vs.* Menefee, 237 U. S., 189, 193.

The fact that the attention of the Court of Appeals may not have been called to this error is immaterial.

In a case reported in 211 U. S., 581, in the concluding paragraph of the opinion, a point

"not dwelt on in argument"

was considered by the court, so that justice might be done, and the decree appealed from was modified.

The point we desire to make is this: The referee found as a fact, on November 15, 1911, the bankrupt executed a note to the First National Bank of Horton, Kansas, and secured the payment of the note by the mortgagee to that bankrupt on all of the machinery in question (Rec., 21). The Court of Appeals directed the machinery

"to be delivered to the Baker Ice Company" (Rec., 35),

without providing for a determination of the interest of the bankrupt in the property.

In any event, if the judgment of the Court of Appeals is to be affirmed, the affirmance should be with the modification that before the machinery is turned over to the Baker Ice Machine Company the First National Bank of Horton, Kansas, be cited to appear and set up its interest in the machinery.

The rule is well settled that a court having in its possession property draws unto itself the determination of all controversies with respect to such property.

All of which is respectfully submitted.

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 42.

J. F. BAILEY, AS TRUSTEE IN BANKRUPTCY OF
GRANT BROTHERS, *Appellant*,

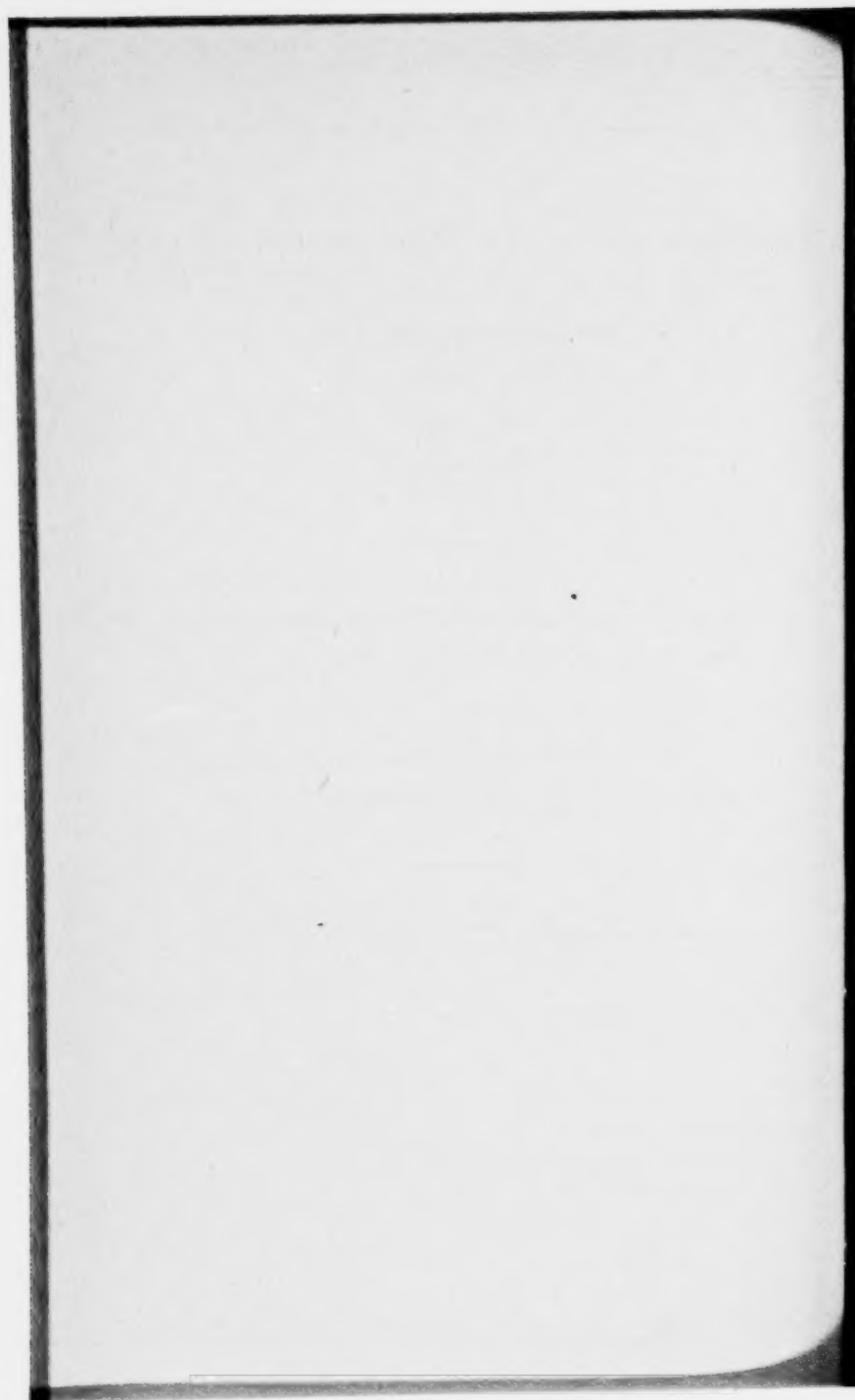
vs.

BAKER ICE MACHINE COMPANY, *Appellee*.

Supplemental Brief for Appellant

EDWIN A. KRAUTHOFF,
Attorney for Appellant.

CHARLES CURTIS,
WILLIAM S. McCLINTOCK,
ARTHUR L. QUANT,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 42.

J. F. BAILEY, AS TRUSTEE IN BANKRUPTCY OF
GRANT BROTHERS, *Appellant*,

vs.

BAKER ICE MACHINE COMPANY, *Appellee*.

Supplemental Brief for Appellant

Since writing the additional brief, the attention of counsel for appellant has been called to the following:

I.

The law applicable with respect to the necessity of recording the instrument, the law of the state of the residence of the purchaser.

In re O'Callaghan, (Mass.) 225 Fed. 133, (Morton, J.)
citing Bryant vs. Swofford Bros., 214 U. S. 279.

In John Deere Plow Co. vs. Mowry, 222 Fed. 1, 3 (Warrington, Knappen and Dennison, JJ.) a dealer in Michigan, ordered im-

plements to be shipped from Indiana. The contract was approved in the latter state and provided: "The law of the state of Indiana to govern the provisions of this contract." (p. 3). The court ruled: "* * * the necessity for recording and the effect upon creditors of a failure to record are to be determined by Michigan law. *Potter Co. vs. Arthur*, 220 Fed. 843" (p. 4).

II.

As to the date as of which the rights of a trustee in bankruptcy as a lien creditor, an opinion is cited of Judge Trieber.

In re T. H. Bunch Commission Co., 225 Fed. 243, 248, 249, 251:

"There can be no doubt but that if, before the mortgage was filed in Pulaski County on October 7, 1914, a creditor would have caused the mortgaged property to be seized under an execution or attachment, the lien obtained thereby would have been superior to that of the mortgagee under the laws of the state of Arkansas as uniformly construed by the Supreme Court of that state ever since 1848.

"Is the trustee in bankruptcy entitled to the same rights that such a creditor would have, in view of the fact that the agreed statement of facts admit that the Commission Company was, at the time the mortgage was filed for record in Pulaski County, insolvent; that T. H. Bunch, its president, who acted as the representative and agent for the intervener, and the attorney who was employed by Mr. Bunch for Mrs. Bunch and acted for her in filing the mortgage for record, actually knew, or beyond question had reasonable cause to know, at the time the mortgage was filed by him for record in Pulaski County, that the Commission Company was insolvent, and that the effect of the mortgage would be to enable Mrs. Bunch to obtain a preference over other creditors, who had unsecured claims?

"Prior to the amendments of 1903 and 1910 of the Bankruptcy Act, it has been determined in *York Manufacturing Co. vs. Cassell*, 201 U. S. 344, 26 Supreme Ct. 481, 50 L. Ed. 782, that the trustee in bankruptcy occupied no better position than the mortgagor, and if the mortgage was good against the mortgagor, it was good against the trustee. By the amendment of 1903, the period of four months within which a preference could be subject to attack

by the trustee in bankruptcy, was to be computed from the date of the recording or registering of the transfer, 'if by law such recording or registering is required.'

"There has been some conflict among the courts inferior to the Supreme Court (that Court never having passed upon that question) what the effect of the amendment of 1903 was; but the Circuit Court of Appeals for the Eighth Circuit, in *First National Bank vs. Connett*, 142, Fed. 33, 73 C. C. A., 219, 5 L. R. A. (N. S.) 148, held that where the statutes of a state required liens to be recorded, the question of insolvency and knowledge thereof is to be determined, as of the date when the mortgage was filed for record, and this date is to be adopted as the date for the purpose of determining the four-month period for the purpose of determining the legality of a preference. This decision has been followed ever since by that court. *McElvain vs. Hardesty*, 169 Fed. 31, 94 C. C. A. 399; *People's State Bank vs. Gleason*, 178 Fed. 1004, 101 C. C. A. 663, affirmed without an opinion, on the authority of the *Connett* case; *Mottley vs. Giesler*, 187 Fed. 970, 110 C. C. A. 90; *Lothrop Bank vs. Holland*, 205 Fed. 143, 123 C. C. A. 375; *Williams vs. German-American Trust Co.*, 219 Fed. 507; *The T. L. Smith Co. vs. Orr*, 224 Fed. 71,—C. C. A.—filed May 12, 1915. Other appellate courts have followed this rule: *Remington on Bankruptcy* (2nd Ed.), 1379½; *Brigman vs. Covington*, 219 Fed. 500,—C. C. A.—(4th Ct.)

"The language of the statute, especially as amended by the act of 1910, is so clear that there is nothing left to construction. But if there were room for doubt as to the intention of Congress on that subject it is removed by the reports of the judiciary committees of the two houses of Congress when the amendment of 1910 was pending. Senate Report No. 691, Sixty-First Congress, Second Session, which accompanied the bill for these amendments, after it had passed the House and was reported to the Senate, concurs in the report of the House Judiciary Committee, which reads as follows:—* * * *

"This shows beyond question that the Congress was of the opinion that the rule laid down in *First National Bank vs. Connett* correctly interpreted its intention, when it enacted the amendment of 1903. But as the courts were not harmonious in the construction of this amendment, the act of 1910 was passed in order that there might be no room for doubt that the opinion in the *Connett* case correctly interpreted the Congressional intention. The

mortgage must therefore be treated as executed on October 7, 1914, when it was first filed for record in accordance with the laws of the state, and became a valid lien, against creditors who had secured a lien by seizure under execution or attachment, or the trustee in Bankruptcy who occupies such a position, his right as such dating back four months prior to the institution of the proceedings. *First Nat. Bank vs. Connett*, 142 Fed. 33, 40, 73 C. C. A., 219, 5 L. R. A. (N. S.) 148. The indebtedness secured thereby was then pre-existing, and, the Commission Company being then insolvent, of which fact the agent and attorneys of the intervenor had notice, and reasonable cause to believe that the enforcement of the mortgage would effect a preference, and being within four months preceding the filing of the petition in bankruptcy against the Commission Company, it is clearly voidable under the provisions of section 60a and 60b. As the trustee could have recovered the property, or its value, if in the possession of the intervenor, he can, of course, defeat an action against him for the recovery of the property by one claiming under such a voidable instrument."

III.

In determining whether a contract was a chattel mortgage or a conditional sale, it has been said:

"To observe where the loss would have been * * * if they (the goods) had been destroyed while in *Miller Bros.*' (the purchaser) possession, will furnish useful tests" (222 Fed. 7).

IV.

That the provision in the contract giving the seller the right to file a mechanic's lien and operating as notice of intention to file a lien, operated as an election to treat the sale as absolute, consult:

Twentieth Century M. Co. vs. Excelsior Springs, etc., Co.
(Mo. App.) 171 S. W. Rep. 944, 947;

Orcutt vs. Rickenbrodt, 59 N. Y. Supp. 1008 (syllabus);

Tanner, etc., Eng. Co., vs. Hall, 89 Ala. 628, 630;

Butler vs. Dodson, 76 Ark., 569, 573;

Alden vs. Dyer, 92 Minn., 134, 136;

Osborn & Co., vs. Walther, 12 Okla. 20, 27.

Seanor vs. McLaughlin, 165 Pa. St. 150, 156, 157;

Britton vs. Trader, 75 Mich., 295.

In a note (23 L. R. A., N. S., 144) to *Frisch vs. Wells*, 200 Mass. 429, 86 N. E., 775, 23 L. R. A. (N. S.) 144, it is said: "*The doctrine of Frisch vs. Wells*, while, as subsequently shown, opposed by some cases, seems to have the support of the weight of authority. It is supported by the following cases, which enunciate and apply the general principle that the seller of goods on conditional sale, upon the default of the buyer in paying the purchase price, has two remedies open to him,—one, to assert his title to the goods and recover possession of them; the other to treat the sale as an absolute one, and the title as having vested in the buyer, and bring an action to recover the purchase price. These remedies are inconsistent, and the pursuit of one precludes the other. The seller cannot, after having elected to treat the sale as absolute, and the title as having vested in the buyer, thereafter assert title to the property under the original retainer of title." (citing authorities).

In *Merchant's and Planter's Bank vs. Thomas* 69 Tex. 237, the first syllabus reads: (conditional sale case):

"To resume possession, cancels the right to enforce payment of the obligation to pay, and an effort to enforce payment, is equivalent to an admission of title in the purchaser."

In *Hickman vs. Richburg*, 122 Ala. 638, 642, it is ruled:

"It is clear that the claimant in this case could not, under the statute, fix a materialman's lien upon property the title to which was in himself, and when he filed his claim and statement with the probate judge for the purpose of creating a lien upon the lumber in question, this was an unequivocal act on his part to treat the lumber as the property of the defendant in execution, and of course a waiver and abandonment of the title reserved on the sale.—*Fuller vs. Eames*, 108, Ala. 464; *Montgomery Iron Works vs. Smith*, 98 Ala. 644; *Thomason vs. Lewis*, 103 Ala. 426; *Lehman, Durr & Co. vs. Van Winkle and Co.*, 92 Ala. 443."

In *Heller vs. Elliott*, 44 N. J. Law. 467, 469, 470, it is said:—

"The law tolerates no such absurdity as a seizure of goods by a person claiming that he has never sold them, and an action by the

same person founded on the sale and delivery of the same goods, for the recovery of the price."

Dowagiac Mfg. Co. vs. Mahon, 13 N. D. 516, 524, it is ruled:—

"Here the title was retained by the plaintiff for his own benefit, *for security purposes solely*. There had been a delivery of the machines to the defendants, and defendants had sold some of them. The plaintiff had the right to waive the security clause of the contract, and by commencing an action for the purchase price of the machines, did waive it."

There are apparently cases to the contrary.

Joseph Goldberger Iron Co. vs. Cincinnati Iron & Steel Co., 153 Ky. 20, 25;

Vaughn vs. Hopson, 10 W. D. P. Bush (Ky.) 337.

But in Kentucky, a conditional sale contract is treated in effect as a chattel mortgage. *Baldwin & Co., vs. Crow*, 86 Ky. 679;

Forbes Piano Co. vs. Wilson, 144 Ala. 586, 587;

Campbell Ptg. Press & Mfg. Co. vs. Rockaway Pub. Co., 56 N. J. Law, 676;

Matthews vs. Lucia, 55 Vt. 308, 310.

But in Vermont, it has been ruled:

Root vs. Lord, 23 Vt. 568, 570 (Redfield, J):—

"The lien, which the defendant retained upon the cow, is very little different, in effect, although somewhat different in form, from that of collateral security for debt, by the way of the pledge, or mortgage, or of personal property. And in such cases it was never doubted, that the creditor might pursue both the debt and the pledge, until he obtained security."

In *Williston on Sales*, Sec. 571, it is stated:—

"It is further generally held that if the seller sues, for the price, he cannot thereafter reclaim the goods, although according to the contract the title was to remain in the seller until the price was paid."

Note 39 states of the cases cited in support of this:

"The error in the decisions first cited is this: the reservation of title by the seller is for the purpose of securing the price. The transaction is in its essence the same as a chattel mortgage given by the buyer on the purchased property to secure the price. See *supra*, § 331 *et seq.* Just as the mortgagee may sue for the price and also foreclose his mortgage upon the property, so the seller in a conditional sale should be allowed to sue for the price and also reclaim the property, not as his own, but for the purpose of foreclosing it; that is—for the purpose of endeavoring to realize from it the full amount due him. Of course, as in the case of a mortgage, the seller should be restricted to satisfaction of his claim with interest. If, therefore, judgment for the price is satisfied in part, this should be credited, and any excess over the amount due, which may be acquired by seizing and disposing of the goods, should be returned to the buyer."

"The retention of title to the engine until it was paid for was legal and, we think, was in effect a chattel mortgage."

Fairbanks, Morse & Co. vs. Baskett, 98 Mo. App. 53, 63.

V.

That possession is *prima facie* evidence of ownership, and that one who permits another to remain in possession of property belonging to him, is estopped to reclaim his own property as against one who changes his position upon the faith and strength of such ownership, is demonstrated in *Elkus and Glenn on Secret Liens and Reputed Ownership* which should be read and considered.

As stated by Tilghman, Ch. J., in *Martin vs. Mathiot*, 14 Serg. & R. (Pa.) 214, 16 Am. Dec. 491: "It is a rule of general policy which declares possession to be evidence of property, and the presumption is, that every man is trusted according to the property in his possession." (Cited in 171 Fed. 305, 312.)

In *Robinson vs. Elliott*, 22 Wall., 513, 525, it is said:

"Manifestly it was executed to enable the mortgagors to continue their business and appear to the world as the absolute owners of the goods, and enjoy all the advantages resulting therefrom. It is idle to say that a resort to the record would have shown the existence of the mortgage, for men get credit by what they apparently own and possess, and this ownership and possession had

existed without interruption for ten years. There was nothing to put creditors on their guard. On the contrary, this long continued possession and apparent ownership were well calculated to create confidence and disarm suspicion."

In *Sexton vs. Wheaton*, 8 Wheat. 229, 238, 244. Mr. Chief Justice Marshall said:

"In the case of *Taylor vs. Jones* (2 Atk. 600) * * * Lord Hardwicke said, 'and it is very probable that the creditors, after the settlement, trusted Edward Jones, the debtor, upon the supposition that he was the owner of this stock, upon seeing him in possession.'

"In this district, every deed must be recorded in a place prescribed by law. All titles to land are placed upon the record. The person who trusts another on the faith of his real property, knows where he may apply to ascertain the nature of the title held by the person to whom he is about to give credit."

In *Toff vs. Nelson*, 109 N. Y. 316, 327, the law was thus stated:

"The theory upon which deeds conveying the property of an individual to some third party have been set aside as fraudulent in regard to subsequent creditors of the grantor has been that he has made a secret conveyance of his property while remaining in the possession and seeming ownership thereof, and has obtained credit thereby, while embarking in some hazardous business requiring such credit or the debts which he has incurred were incurred soon after the conveyance, thus making the fraudulent intent a natural and almost a necessary inference, and in this way he has been enabled to obtain the property of others who were relying upon an appearance which was wholly delusive."

In *Casey vs. Cavaroc* 96 U. S. 467, 484, it is said:—"When the debtor is obliged to surrender possession, he cannot deceive third parties dealing with him by keeping possession of the pledged articles as part of his estates, and getting credit thereby."

VI.

As to the right of a federal court to reach its own conclusion in a case involving a question of commercial law:

"* * * there is no settled rule in Michigan applicable to the precise facts disclosed by this record; and it is only to such settled rule that we should yield our own judgment. *Burgess vs. Seligman*, 107 U. S. 20, 33." (222 Fed. pp. 6, 7.)

VII.

In the last brief filed by counsel for appellee, the contention is made, with respect to the outstanding mortgage on the property in controversy held by First National Bank of Horton, Kansas (Rec. 21): " * * * it operated only to convey to the mortgagee, the right the vendee possessed * * * to complete the payment of the purchase price to the vendor, and thereby obtain the legal title to the property." (Brief, p. 4.) This contention it is submitted should not be decided, absent from the record, the mortgagee.

Even in the case of a sale free and clear of incumbrances, "it is essential that a lien holder whose rights may be affected, should have had due opportunity to defend his interest, and due notice to appear for that purpose. Ray vs. Norseworthy, 23 Wall. 128, 135; Re Foundry & Machinery Co. (D. C.) 147 Fed. 828."

In re Crowell (Mass.) 199 Fed. 659, 661 (Dodge, J.)

The cases cited (Ray vs. Norseworthy; In re Foundry & Machinery Co.) hold "that in the proceedings for the sale of the bankrupt's estate, secured creditors must have due opportunity to defend their interests."

McKay vs. Hamill, 185 Fed. 11, 15 (Gray, Buffington and Lanning, JJ.)

2 Remington on Bankruptcy (2d Ed.), sec. 1889.

Black on Bankruptcy, sec. 471.

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17
UNITED STATES COURT, U. S.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 42

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OF GRANT BROTHERS, BANKRUPT, APPELLANT,**

vs.

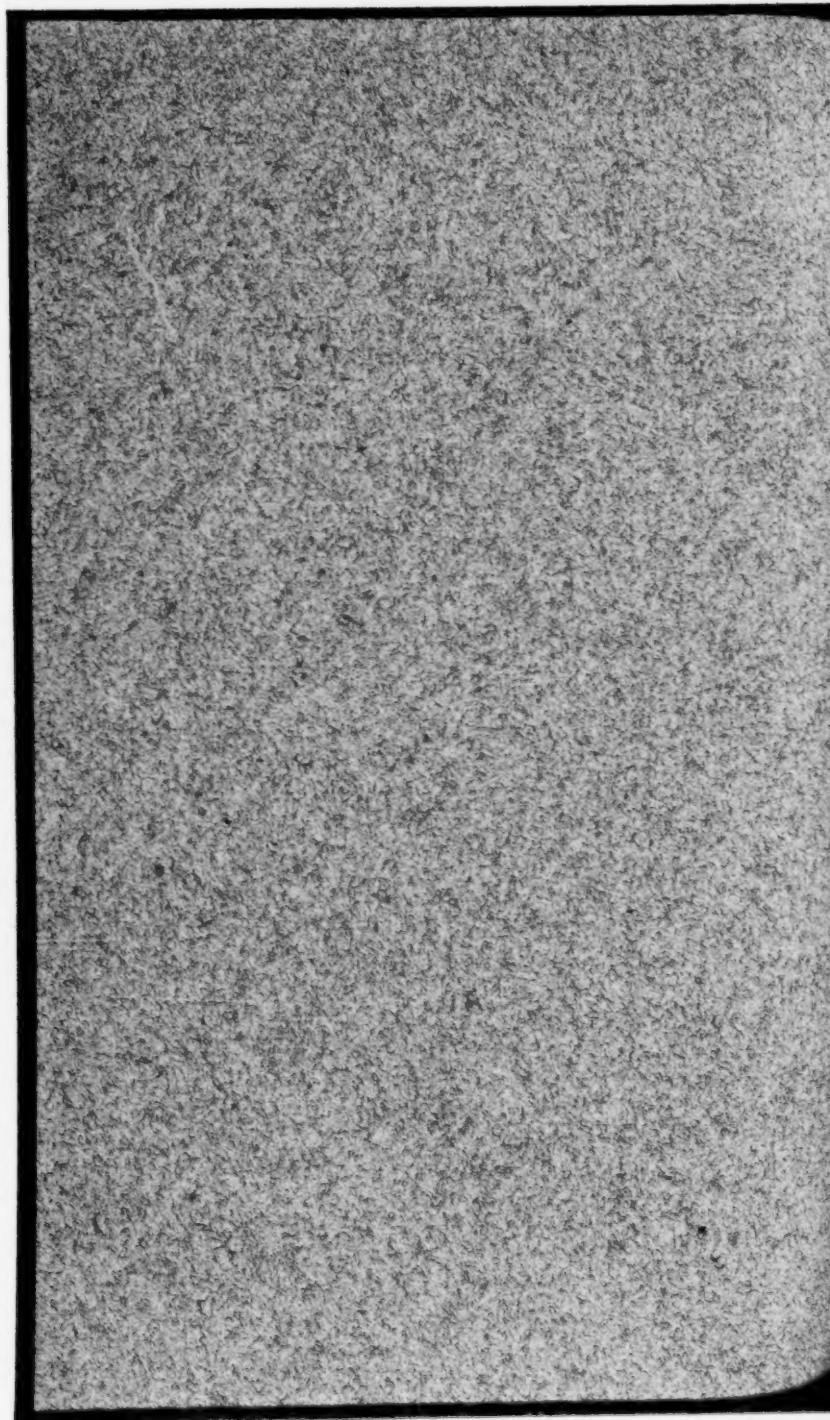
BAKER ICE MACHINE COMPANY, APPELLEE.

**APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.**

STATEMENT AND BRIEF FOR APPELLANT.

EDWIN A. KRAUTHOFF,
Attorney for Appellant.

**CHARLES CURTIS,
W. S. McCLINTOCK,
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Of Counsel.



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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 321.

J. F. BAILEY, TRUSTEE IN BANKRUPTCY IN THE MATTER
OF GRANT BROTHERS, BANKRUPTS, APPELLANT,

vs.

BAKER ICE MACHINE COMPANY, APPELLEE.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE EIGHTH CIRCUIT.

STATEMENT AND BRIEF FOR APPELLANT.

Statement.

On July 11, 1912, the firm of Grant Brothers, a copartnership, was adjudged bankrupt upon its voluntary petition in the District Court of the United States for the District of Kansas, First Division, filed on the same day. Thereafter, Baker Ice Machine Company filed in said proceeding in bankruptcy, before the referee having charge of the administration of the estate, an intervening petition, claiming to be entitled to certain ice manufacturing machinery, under a contract claimed to be one of conditional sale.

In due course of proceeding, a hearing was had upon the

merits of the controversy before the referee in bankruptcy, and after a complete hearing the referee entered an order disallowing the intervening petition of the Baker Ice Machine Company, and the referee made and filed therewith findings of fact and conclusions of law (R., 22). The Baker Ice Machine Company within the time therefor, petitioned to the judge of the District Court of the United States for the District of Kansas, to review the order of the referee disallowing its intervening petition. However, the Baker Ice Machine Company did not call for a transcript of the evidence upon which the referee made his findings and conclusions and order, nor did it request that this evidence be sent up with the papers on the petition for review. Upon final hearing of the petition for review, an order was entered by the District Court of the United States for the District of Kansas, First Division approving and confirming the decision and order of the referee. The Baker Ice Machine Company petitioned said judge for a rehearing, which was denied, and from the order of said court overruling the petition for review, the Baker Ice Machine Company duly appealed to the Circuit Court of Appeals of the United States for the Eighth Circuit, and upon final hearing, the order of the referee and of the judge of the lower court, denying the relief prayed for in the intervening petition of the Baker Ice Machine Company, was reversed. It is from the decree of the Circuit Court of Appeals for the Eighth Circuit that this appeal is taken.

The Baker Ice Machine Company did not at any time challenge the correctness of the findings of fact of any of the lower courts, and did not at any time seek to have any of the proofs produced before the referee reviewed on any appellate proceeding, the findings of fact made by the referee, are as follows:

“Now on this 15th day of February, 1913, the referee, having heard the evidence submitted on behalf of the intervenor, The Baker Ice Company, and

on behalf of the trustee in bankruptcy, and being fully advised in the premises, makes the following findings of fact, conclusions of law, and order thereon:

"Findings of Fact.

"(1) That on July 11th, 1912, the firm of Grant Brothers, consisting of Roy Grant, Carl Grant, and Beatrice Grant, filed its voluntary petition in bankruptcy in this district, and was on the same day adjudged a bankrupt.

"(2) That on October 14th, 1911, the firm of Grant Brothers entered into a written contract with the Baker Ice people, at Omaha, Nebraska, for the purchase of ice machinery of the total value of \$5,940.00, payable in installments, the machinery to be shipped to Horton, Kansas, and installed by the Baker Ice Company; said contract being what is commonly called a conditional sale contract.

"(3) Said conditional contract was never filed of record in the State of Nebraska, and was not filed in the office of the register of deeds of Brown County, Kansas, until May 15th, 1912.

"(4) That the first shipment of machinery under said contract arrived in Horton, Kansas, on November 15th, 1911, with a sight draft for \$1,000.00 attached to the bill of lading, and the second shipment arrived in Horton, Kansas, on November 20th, 1911, with a sight draft for \$1,500.00 attached to the bill of lading.

"(5) That in order to meet the drafts above mentioned, Grant Brothers, on November 15th, 1911, borrowed of the First National Bank, of Horton, Kansas, the sum of \$2,500, and executed a note and mortgage to the First National Bank on all of said ice machinery to secure the payment of said note, which chattel mortgage was filed in the office of the register of deeds of Brown County, Kansas, on November 17th, 1911.

"(6) That thereafter other shipments arrived in Horton, Kansas, and said machinery was installed under the supervision of G. K. Williams, the representative of the Baker Ice Company, and was, on February 5th, 1912, accepted in writing by Grant Brothers at Horton, Kansas.

"(7) That on the 5th day of February, 1912, Roy Grant and Carl Grant told said G. K. Williams that they were unable to pay the note of \$500.00 which had become due the Baker Ice Company, on February 1st, 1912, and told said G. K. Williams that they had borrowed all the money they could borrow and that they had executed to the First National Bank, of Horton, Kansas, a chattel mortgage on said ice machinery to secure the money by them borrowed from said bank.

"(8) That the second note in the sum of \$600.00 due the Baker Ice Company from Grant Brothers fell due April 20th, 1912.

"(9) That between the 5th day of February, 1912, and the 15th day of May, 1912, Grant Brothers wrote the Baker Ice Company numerous letters, advising them that they were unable to pay said \$500.00 note, which had become due February 1st, 1912, and said \$600.00 note, which had become due April 20th, 1912, and further advising said Baker Ice Company that they had borrowed all the money they could borrow.

"(10) That on the 15th day of May, 1912, said \$500 and said \$600 notes were past due and unpaid, and said firm of Grant Brothers was insolvent.

"(11) That on the 15th day of May, 1912, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent, and that by filing the conditional sale contract in the office of the register of deeds of Brown County, Kansas, it would effect a preference to the Baker Ice Company over the other creditors of said firm of Grant Brothers.

"(12) That the firm of Grant Brothers retained possession of said ice plant machinery until the receiver in bankruptcy took possession of the same on July 13th, 1912.

"Conclusions of Law.

"(1) That said conditional sale contract was governed by the laws of the State of Kansas.

"(2) That on May 15th, 1912, at the time of the filing of said conditional sale contract in the office

of the register of deeds of Brown County, Kansas, the Baker Ice Company had reasonable cause to believe that said firm of Grant Brothers was insolvent and that the effect of the filing of said contract would be to prefer the Baker Ice Company over the other creditors of Grant Brothers.

"(3) That the filing of said conditional sale contract by the Baker Ice Company in the office of the register of deeds of Brown County, Kansas, on the 15th day of May, 1912, constituted a voidable preference within the meaning of the bankruptcy act.

"It is therefore, ordered: that the intervening petition of Baker Ice Company be and the same is hereby disallowed and denied.

"Done at Kansas City, Kansas, in said district, this 15th day of February, 1913" (R., 20, 21, 22).

After the Baker Ice Machine Company filed its petition for review in the District Court of the United States for the District of Kansas, First Division, and prior to the determination of the petition for review, the property involved in this controversy was sold for \$2,800. This fixes the amount involved on this appeal (Rec., 39, 40, 41).

Assignments of Error.

The assignments of error urged by appellant as ground for the reversal of the decree of the United States Circuit Court of Appeals for the Eighth Circuit in this cause are as follows:

"1st. The firm of Grant Brothers and the individual members thereof being on May 15th, 1912, and ever since said date wholly insolvent, and the claim of Baker Ice Machine Company being on said date, as well as prior thereto, wholly a pre-existing indebtedness, and wholly unsecured except for the conditional sale contract in controversy which prior to May 15th, 1912, was not on file in any public office, and since said Baker Ice Machine Company filed said conditional sale contract, on May 15th, 1912, in

the proper office of the Register of Deeds for Brown County, Kansas, at a time when it had reasonable cause to believe that said firm of Grant Brothers and the members thereof were insolvent, and that it was thereby receiving a preference over the other creditors of said bankrupts, and since said Baker Ice Machine Company did in fact then and thereby receive such preference the court erred in adjudging that the conditional sale contract in controversy did not constitute a transfer effective on May 15th, 1912, the date of its filing, and that The Baker Ice Machine Company did not then and thereby receive a preference voidable by J. F. Bailey, as the trustee of the estate in bankruptcy of Grant Brothers, bankrupts.

"2nd. The court erred in adjudging that the Baker Ice Machine Company did not receive a preference voidable by J. F. Bailey, as trustee of the estate of Grant Brothers, bankrupts.

"3rd. The court erred in adjudging that said conditional sale contract did not constitute a transfer effective as of the date of its filing, May 15th, 1912, and within four months next preceding the date of the filing of the voluntary petition in bankruptcy by Grant Brothers, whereas it should have held that said contract was a transfer effective as of the date of its filing, May 15th, 1912, within the meaning of section 1 subdivision (25) and section 60, subdivisions *a* and *b* of the National Bankruptcy Act of 1898 as amended in 1910.

"4th. The court erred in adjudging that the lien of said conditional sale contract was not voidable by J. F. Bailey as trustee of the estate in bankruptcy of Grant Brothers, bankrupts, whereas it should have held it to have been voidable by him as such trustee within the meaning of section (47) forty-seven, subdivision 25 of the National Bankruptcy Law of 1898 as amended in 1910."

Argument.

Appellant's attention has been directed to the following:

In re Farmers' Co-operative Co. of Barlow (D. C. N. D.), 202 Fed., 1005.

In re Anson Merc. Co. (D. C. D.), 203 Fed., 871.

Big Four Implement Co. vs. Wright (8 C. C. A.), 207 Fed., 535.

Baker Ice Machine Co. vs. Bailey (8 C. C. A.), 209 Fed., 603.

Hart vs. Emerson-Brantingham Co. (D. C. Mo.), 203 Fed., 60.

In re White Express Co. (2 C. C. A.), 215 Fed., 894,
Holt vs. Henley, 232 U. S., 637.

These three latter cases, however, are easily distinguishable from the questions involved on this appeal on the ground that the contracts in the cases last cited had been executed prior to the day the 1910 amendment to the bankruptcy act took effect, and inasmuch as that amendment had no retroactive effect, the contract then already in existence could not be subject to the burdens imposed by the 1910 amendment. The attention of the court is directed to the fact that the case of *Baker Ice Machine Company vs. Bailey*, 209 Fed., 603, is based upon the decision of *Big Four Implement Company vs. Wright*, 207 Fed., 535, decided by the same court, and that aside from these decisions all the cases decided upon the precise point involved in this appeal, are decisions of district courts arising in circuits other than the eighth circuit. Both of the cases decided by the Eighth Circuit Court of Appeals arose in the district of Kansas, and in each instance the district court was reversed.

The case of *In re Anson Mercantile Company*, 203 Fed., 871, is not carefully reasoned, and does not weigh or consider the effect of section 60 subdivision *b*, of the bankruptcy

act as amended in 1910, and the decision of the district court in this Anson case is based upon the contention that under section 47, subdivision "A" (2), of the bankruptcy act, the trustee has only the rights and remedies of an attaching or execution creditor *as of the date of commencement of bankruptcy*, and not prior thereto. Never in this case is the effect or purpose of the amendments of 1910 to section 47, subdivision "A" (2), and section 60, subdivision *b*, of the bankruptcy act considered together.

The case of *In re Farmers' Co-operative Company of Barlow*, 202 Fed., 1005, if it be considered as an authority entitled to weight, is against the claim of the Baker Ice Machine Company rather than in its behalf, for the court says therein:

"If the purchaser pays down a part of the purchase price at the time of the sale, or at a subsequent date before the seller attempts to enforce the condition, it is quite true that the buyer has an equitable interest in the property by reason of the payments. When the facts present such a case, it may be that a court of bankruptcy will find a way to protect the equitable interest of the bankrupt against forfeiture (Williston on Sales, par. 579). The present case, however, presents no such questions, for the evidence shows, and the referee has found, that the amount now due on the contract considerably exceeds the purchase price of the property here involved.'"

The record shows that the original purchase price of the property in the present case was to be \$5,940. Upon this purchase price \$1,000 was paid on November 15, 1911, and \$1,500 on November 20, 1911, leaving a balance unpaid of \$3,440. \$2,500, nearly one-half of the original purchase price, was paid down even before the machinery passed into the physical control of the bankrupt and before its installation in their plant at Horton, Kansas.

Section 60, subdivisions (a) and (b), of the bankruptcy act of 1898, prior to the amendment of 1910, provided:

"A person shall be deemed to have given a preference, if, being insolvent, he has, *within four months before the filing of the petition, or after the filing of the petition and before the adjudication*, procured or suffered a judgment to be entered against himself in favor of any person, or made a transfer of any of his property, and the effect of the enforcement of such judgment or transfer will be to enable any one of his creditors to obtain a greater percentage of his debt than any other of such creditors of the same class. *Where the preference consists in a transfer, such period of four months shall not expire until four months after the date of the recording or registering of the transfer, if by law such recording or registering is required.*

"If a bankrupt shall have given a preference and the person receiving it, or to be benefited thereby, or his agent acting therein, shall have had reasonable cause to believe that it was intended thereby to give a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. *And for the purpose of such recovery, any court of bankruptcy as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.*"

Under the amendment of 1910, section 60, subdivision a, has remained unchanged, but subdiviison b of the same section has been amended to read as follows:

"If a bankrupt shall have procured or suffered a judgment to be entered against him in favor of any person or have made a transfer of any of his property, and if, at the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer *if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing thereof and before the adjudication, the bankrupt be*

insolvent and the judgment or transfer then operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe that the enforcement of such judgment or transfer would effect a preference, it shall be voidable by the trustee and he may recover the property or its value from such person."

Section 47 "a" (2), which refers to the duties of trustees, reads as follows:

*"Trustees shall respectively * * * (2) collect and reduce to money the property of the estate for which they are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied." * * **

Section 1, subdivision 25, of the present bankruptcy act defines transfer as follows:

"Transfer shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security."

Section 5224 of the General Statutes of Kansas for 1909 provides for the filing of chattel mortgages, and is as follows:

"Every mortgage or conveyance intended to operate as a mortgage of personal property, which shall not be accompanied by an immediate delivery and be followed by an actual and continued change of

possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor, and as against subsequent purchasers and mortgagees in good faith, unless the mortgage, or a true copy thereof shall be forthwith deposited in the office of the register of deeds in the county where the property shall then be situated, or if the mortgagor be a resident of this State, then of the county of which he shall at the time be a resident."

The rights of an execution or attaching creditor in Kansas against personalty incumbered by an unfiled chattel mortgage has been well decided in the following case:

Geiser vs. Murray, 84 Kans., 450.

In this case the Supreme Court of Kansas held that an execution creditor could levy upon personal property of his debtor against which there is an unfiled chattel mortgage, and the levy would be superior to the chattel mortgage even if the execution creditor at the time of the levy had notice or knowledge of the chattel mortgage.

See also the case of:

Moffatt vs. Beeler, 91 Kan., 209.

In this case it was decided that a trustee in bankruptcy under the bankruptcy act as amended in 1910, had a right to personalty incumbered by an unfiled chattel mortgage superior to that of the chattel mortgage.

Previous to the amendments of the bankruptcy act in 1910 it was held by the greater weight of authority with reference to chattel mortgages in States having laws requiring the same to be filed to render them valid liens against creditors, that the execution and delivery of chattel mortgages constitute transfers, and that when they were withheld from filing or recording until insolvency and within the four months next preceding bankruptcy, a voidable preference in bankruptcy arose as of the date of the recording or filing of such chattel mortgages as required by the State law. On

this point the attention of the court is directed to the following cases:

First National Bank *vs.* Connett (8 C. C. A.), 142 Fed., 34.

English *vs.* Ross (D. C. Pa.), 140 Fed., 630.

Loeser *vs.* Bank (6 C. C. A.), 148 Fed., 975.

In re Reynolds (D. C. Ark.), 153 Fed., 295.

In re Beckhaus (7 C. C. A.), 177 Fed., 141.

People's State Bank *vs.* Gleason (appeal from Kans., 8 C. C. A.), 178 Fed., 104.

Mattley *vs.* Geissler (8 C. C. A.), 187 Fed., 970.

In re Bothe (8 C. C. A.), 173 Fed., 597.

Post *vs.* Berry (8 C. C. A.), 175 Fed., 564.

However, there were other decisions by other circuit courts of appeal opposed to the views expressed in the above cases. See the following cases:

Meyer Bros. Drug Co. *vs.* Pipkin Drug Co. (5 C. C. A.), 136 Fed., 396.

In re Sturtevant (7 C. C. A.), 188 Fed., 196.

During the same period there were other numerous decisions involving conditional sale contracts, and the effect of the failure to file the same for record under State laws as against trustees in bankruptcy, which line of authority culminated in the following case:

York Mfg. Co. *vs.* Cassell, 201 U. S., 344.

It was the manifest advantage given to the holder of an unrecorded lien upon the bankrupt's property under the decision of York Mfg. Co. *vs.* Cassell, and under cases like Meyer Bros. Drug Co. *vs.* Pipkin Drug Co., and also the conflict of decisions over the question of when the preferences arose in case of the recording of chattel mortgages executed prior to the four months preceding bankruptcy, but recorded within such period, that lead to the amendments

of section 47-a (2) and section 60, subdivision *b*, by the amendatory act of 1910. The amendments themselves very clearly show that the bankruptcy act sets its face strongly against any lien required to be filed or recorded by State law, which is kept from record until the insolvency of the maker thereof renders the recording or filing of it necessary. However, there is no better commentary upon the object of these amendments and the intent with which they were made than the report on these amendments contained in the report of the Senate Judiciary Committee of the 61st Congress, 2d session, and the written remarks of Congressman Sherley, which remarks are set out at length in the *Congressional Record*. Section 8 of H. R. 20575, the bill which was enacted into the law of 1910 amending the National Bankruptcy Act, is as follows:

“SECTION 8. That section 47, clause 2, of subdivision *a*, of said act, as so amended be, and the same hereby is, amended so as to read as follows:

“‘Collect and reduce to money the property of the estates for which there are trustees, under the direction of the court, and close up the estate as expeditiously as is compatible with the best interests of the parties in interest; and such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceeding thereon; and also as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied.’”

Pages 6 and 7 of Report 691 of the Senate Judicial Committee of the 61st Congress, 2d session, on H. R. 20575, contains the following:

“SECTION 8. The House committee report on this section is concurred in. It reads as follows:

“‘One of the most important decisions under the present law is *York Manufacturing Company vs. Cas-*

sell (201 U. S., 344), wherein it was held that property covered by an unrecorded instrument, which would have been void in the State courts had the property been taken by an assignee or receiver, or levied upon by attachment or execution, was not void where possession was taken by a receiver or trustee in bankruptcy, the Supreme Court holding that the trustee stood precisely in the bankrupt's shoes with regard to the unrecorded instrument, even though in the State courts had the seizure been made by an assignee in insolvency, or receiver, or by the sheriff under execution or attachment, the unrecorded lien would have been void as against creditors. By this ruling the trustee in bankruptcy is held to be vested solely with the bankrupt's own title, except as to property fraudulently transferred, and as to property which (within four months before the bankruptcy) has been seized by a creditor by legal process, or voluntarily transferred to him by way of a preference.

"The trustee, under the present law, does not (except as to fraudulently transferred property) take the rights that a creditor under the State law might have acquired, but only such as some creditor has actually acquired by levy or process, and then only in the event that such levy occurred within four months before the bankruptcy and the lien of the levy (otherwise void under section 67f) be preserved for the benefit of the trustee by order of the court, and then it is void only to the extent of the execution or attachment levied. In this way a distinct advantage is given in bankruptcy to the holders of unrecorded liens. The creditors' hands meanwhile are tied from making any levy, because the separate rights of the creditors have become vested in the trustee for all; besides which, as to property already in the custody of the bankruptcy court, of course individual creditors will be in contempt of court should the levy run. Thus the evil of secret liens has continued. It is this evil and the injustice worked upon creditors who rely upon the debtor's apparent ownership against which the bankruptcy law has set its face.

"The proposed amendment, whilst correcting the defect named, at the same time carefully guards the

rights of all parties. It is evident that in the proposed amendment attempt is made to give effect to two ideas quite distinct: First, that as to the property in the custody of the bankruptcy court the bankruptcy trustee shall be considered to have the same title that a creditor holding an execution or other lien by legal or equitable proceeding levied upon that property would have under State law; and second, that as to property not in the custody of the bankruptcy court the trustee should stand in the position of a judgment creditor holding an execution returned unsatisfied, thus entitling him to proceed precisely as an individual creditor might have done to subject assets. In the same way, in effect, proceedings in bankruptcy would give the creditors all the rights that creditors under the State law might have had, had there been no bankruptcy, and from which they are debarred by the bankruptcy—certainly a very desirable and eminently fair position to be granted to the trustee.’ ”

Congressman Sherley caused to be printed in the Congressional Report, volume 45, part 3, of the *Congressional Record* of the 61st Congress, 2d session, at page 2277, written remarks and explanation concerning the object of the amendment of this section of the bankruptcy act of 1910, which are in almost identically the same language as the report of the judicial committee.

Section 11 of the amendatory act of 1910, amending the national bankruptcy law, is as follows:

“SECTION 11. That section sixty, subdivision *b* of said act as so amended be, and the same hereby is, amended so as to read as follows:

“ ‘If a bankrupt shall have procured or suffer a judgment to be entered against him in favor of any person, or has made a transfer of any of his property, and if the time of the transfer, or of the entry of the judgment, or of the recording or registering of the transfer if by law recording or registering thereof is required, and being within four months before the filing of the petition in bankruptcy or after the filing

thereof, and before the adjudication, the bankrupt be insolvent and the judgment or transfer thereof operate as a preference, and the person receiving it or to be benefited thereby, or his agent acting therein, shall then have reasonable cause to believe the enforcement of such judgment or transfer will effect a preference, it shall be voidable by the trustee, and he may recover the property or its value from such person. And for the purpose of such recovery, any court of bankruptcy, as hereinbefore defined, and any State court which would have had jurisdiction if bankruptcy had not intervened, shall have concurrent jurisdiction.' ”

Page 8 and a portion of page 9 of the report of the same judicial committee (*supra*) is as follows:

“SECTION 11. The House committee report upon this section is concurred in. It reads as follows:

“The object of this amendment is further to protect against the evil of secret liens, against which evil this same section was amended in 1903, but in such an unfortunate way as not effectually to prevent such liens.

“As the present law stands, even as amended in 1903, secret liens are still being held good in many jurisdictions, notably in Wisconsin, where the Supreme Court of that State has held in effect, in the case of *Clarige vs. Evans* (118 N. W., 198), that a mortgage withheld for years from record is not a preference, even if finally filed within a few days before bankruptcy, provided the debtor was not insolvent at the time it was given, years beforehand, or provided it were given for money that passed.

“Thus as the law stands, even by the amendment of 1903 as construed in many jurisdictions, a debtor may, if solvent at the time or if presently passing consideration be then received, give a chattel mortgage or other lien upon his property requiring recording by the State law, and the creditor receiving it may keep this lien off the record for months or even years (if not so done by collusive agreement), and file it within a few days of bankruptcy, and yet the lien be

held perfectly good. This is so held because the courts rule that the insolvency of the debtor, the existence of a pre-existing debt, and all the other elements of a preference are to be determined as of the date of the transfer between the parties. The amendment of 1903, by declaring that four months period should not begin to run until the date of the recording where the recording is "required" by State law, evidently attempted to make the date of the recording in such instances the date of which the existence of insolvency, as a pre-existing consideration, and of all the other elements of the preference should be taken.

"Nevertheless, the amendment of 1903 did not effectually accomplish this object. As the law now is construed, even if the recording be not done until within the four months period, on the very eve of bankruptcy, yet if at the time of the original transfer, which might have occurred years beforehand, the debtor was solvent or the lien has been given upon a then presently passing consideration, the transfer would not be set aside as a preference, the date of the "transfer" under any theory whatever being necessarily the date at which all the elements of the preference must be proved to have existed.

"The real trouble, it seems, is this: There are, in reality, two times of "transfer" in such cases, as between the transferor and transferee obviously the time of transfer is the time of the original execution and delivery of the instrument to the grantee or transferee, regardless of its registration; but as to other creditors and the rest of the outer world, the "transfer" is, by the State statute, not a complete "transfer" at all until recording, until delivery to the public record—then, and not until then, the debtor signifying to outside parties, to all others who might not become interested in his assets, the effectual separation of the lien property from the rest of his assets. This, it must be conceded, is the bottom principle upon which rests the recording statutes of all our States. It is also the bottom principle of the right to legislate against secret liens. Thus, in our bankruptcy preference statute, the great object like-

wise should be to make clear that the "transfer," so far as outside parties becoming interested in the estate are concerned, is not complete or perhaps is not even to be considered a "transfer" at all (in cases where State law requires recording as against creditors) until delivery of the instrument to the record for registration.

"Creditors, then, by these supreme court decisions construing the preference provisions of the present bankruptcy act, must be able to prove that at the time of the "transfer," perhaps several years beforehand, the debtor was then insolvent, the debt was then a past, a pre-existing debt, etc.—a practical impossibility; indeed, an unreasonable requirement, since it is the present insolvent fund of the debtor that is rightly involved and not some ancient fund existing years beforehand.

"This proposed amendment squarely and clearly makes the date of the recording (where recording is required under State law to make the lien valid as against levying creditors) the date at which the creditor is to prove the existence of all the elements of a preference—truly the right date, for, as above noted, it is the present insolvent fund with which the creditors are concerned, not the debtor's estate in the condition which might have existed two or three years beforehand.

"Further, the amendment of 1903, making the existing of a "reasonable cause to believe" on the creditor's part a prerequisite to the trustee's right to recover the preference from him, requires that this reasonable cause of belief should be that a "preference was intended to be given," rather than that a "preference would be effected." Logically, it is the creditor's knowledge or belief that a preference would be effected that should be the test, rather than his knowledge or belief of the debtor's intention to prefer.

"This amendment, viewed in the light of the previous discussion, would seem to speak clearly. It brings forward to the date of the recording the proof of the insolvency and of all other operative facts of the preference, and makes the section conform to the

real and actual intention of the framers of the amendment of 1903.

"Indeed, it is perhaps merely declaratory of the law as it exists today, as laid down in the following cases, to wit, *Bank vs. Connett*, 143 Fed., 35, Circuit Court of Appeals:

"The mortgages constituted a transfer of his property, and their effect was to enable the bank to obtain a greater percentage of its claims than other creditors. They were recorded within a few months after the filing of the petition in bankruptcy. Therefore, assuming that a recording is required by the laws of Missouri, it follows that a preference arose under section 60a. And, in our opinion, it also follows that the preference arose when the mortgages were recorded and not as of the date they were given. In other words, the amendment of 1903 was intended to remedy the evil resulting from secret instruments of transfer of the bankruptcy property, the withholding of them from record until shortly before the institution of bankruptcy proceedings, and the then assertion of them as of the prior date of their execution and delivery. And this was accomplished by making the rights of a creditor thus favored determinable by the conditions existing when he caused the transfer to him to be recorded as required by the State law rather than by those existing at the time he secured it.

"*McIlvain vs. Hardesty*, 169 Fed., 31; 22 A. B. R., 32 (U. S. C. C. A. from Mo.):

" * * * The effect of the transfer to McIlvain is to be judged as if made on the 7th day of July, 1905, when it was filed for record. If C. & C. were then insolvent, and if the effect of the enforcement of the transfer was to enable McIlvain to obtain a greater percentage of his debt than any other of the simple contract creditors, the transfer constituted a preference within the meaning of the bankruptcy law * * * as, for the purpose of this case, the transfer is to be treated as made on the date the agreement was recorded, so the transferee's belief or cause for belief concerning it must relate to that time.

“Also see *In re Hickerson*, 20 A. B. R., 682 (U. S. D. C.).

“But there are contrary holdings. The question is continually arising, and is a frequent source of litigation. It is of such importance that it should be set at rest.”

On pages 2278 and 2279 of volume 45, part 3 of the *Congressional Record* for the 2d session of the 61st Congress, appear the following remarks of Congressman Sherley, a member of the Judiciary Committee, relating to the 1910 amendment to the bankruptcy act, and more particularly to section 60, subdivision b:

“The object of this amendment is to protect against the evil of secret liens, against which evil this same section was amended in 1903, but in such an unfortunate way as not effectually to prevent such liens. As the present law stands, even as amended in 1903, secret liens are still being held good in many jurisdictions, notably in Wisconsin, where the Supreme Court of that State has held distinctly in the case of *Clarige vs. Evans* (118 N. W., 198) that a mortgage withheld for years from record is not a preference, even if finally filed within a few days before bankruptcy, providing the debtor were not insolvent at the time it was given, years beforehand, or provided it were given for money then passed.

“Thus as the law stands, even by the amendment of 1903, as construed in many jurisdictions, a debtor may if insolvent at the time, or if present passing consideration be then received, give a chattel mortgage or other lien upon his property, requiring recording by the State law, and the creditor receiving it may keep this lien off the record for months or even years—if not so done by agreement—and file it within a few days of bankruptcy, and yet the lien be held perfectly good. This is so held because the courts rule that the insolvency of the debtor, the existence of a pre-existing debt, and all the other elements of the preference are to be determined as of the date of the transfer between the parties. Thus, if at the date of the original giving of the chattel

mortgage, the debtor was insolvent or present consideration were then given, the transfer would not be a preference no matter if the instrument be not recorded until within a few hours before the bankruptcy, and with full knowledge of the debtor's impending failure. The amendment of 1903 by declaring the four months' period should not begin to run until the date of the recording where the recording is 'required,' by State law, evidently attempted to make the date of the recording the date at which the existence of insolvency, as a present consideration, and of all the other elements of a preference should be taken. Nevertheless, the amendment of 1903 did not effectually accomplish this object. Even if the recording be not done until within the four months' period, yet if at the time of the original transfer, which might have occurred years beforehand, the debtor was solvent or the lien had been given upon a then present passing consideration, the transfer would not be set aside as a preference: the date of the 'transfer' under any theory would always be necessarily the date at which all the elements of the preference must be proved to have existed.

"The real trouble, it seems, is this; there are, in reality, two times of 'transfers' in such cases. As between the transferor and transferee obviously the time of transfer is the time of the original execution and delivery of the instrument to the grantee or transferee, regardless of its registration; but as to other creditors and the rest of the outer world the 'transfer' is by statute not a complete 'transfer' nor, perhaps, a 'transfer' at all until the record—until the delivery to the public recorder. Then, and not until then, has the debtor signified to outside parties, to all others who might become interested in his assets, the effectual separation of the lien property from his other assets. This, it must be conceded, is the bottom upon which the recording statute rests. It is also the bottom principle of the right to legislate against secret liens. Thus, in our preference statute, the great object should be to make clear that the 'transfer' so far as outside parties becoming interested in the estate or concern, is not complete or perhaps,

is not even to be considered a 'transfer' at all until delivery of the instrument to the recorder for registration."

"We have seen that despite the amendment of 1903 the supreme courts of some of the States are still holding in effect, that liens withheld from record (for years may be) may not be preferences in bankruptcy, even if they are not recorded until within a few days before bankruptcy; so that all that a careful creditor need do is to take a chattel mortgage at the time he begins business with the debtor, keep it off the record as long as he wants to (providing he does not do so by 'agreement' with the debtor), and then slam it on, one or two years afterwards on the eve of bankruptcy. Creditors, then, by these State Supreme Court decisions must be able to prove that at the time of the 'transfer' perhaps several years beforehand, the debtor was then insolvent, the debt was then as stated, a pre-existing debt, etc.—a practical impossibility, indeed, and an unreasonable requirement, since it is the present insolvent fund of the debtor that is rightfully involved, and not some ancient fund existing years beforehand.

"This proposed amendment squarely and clearly makes the date of the record (where recording is required under State law to make the lien valid as against levying creditors), the date at which the creditor is to prove the existence of all the elements of a preference—truly, though rightly, for as above noted, it is the present insolvent fund with which creditors are concerned, not the debtor's estate in the condition which might have existed two or three years beforehand.

"This amendment viewed in the light of the previous discussion would seem to speak for itself. It brings forward to the date of the recording the proof of the insolvency and all the other operative facts of the preference, and makes the section conform to the real and actual intentions of the framers of the amendment of 1903."

It was contended originally by The Baker Ice Machine Company that the contract was made in Nebraska; that by

the laws of Nebraska the contract was not required to be registered or recorded, and that the law of Nebraska controlled the decision of the point. However, the trial court found, upon proper showing, that while the contract was signed in Nebraska, the parties thereto intended that the property therein described should be immediately shipped to and permanently located in Horton, Kansas. The record in fact also shows that a large part, if not all, of the property covered by the contract was in fact under the exclusive control of appellant until it reached Horton, Kansas, and until bankrupts paid \$2,500 on the purchase price, because appellant shipped same to Horton, Kansas, and drew two drafts for \$1,000 and \$1,500, respectively, upon bankrupts with the bills of lading for the machinery attached thereto. In addition, the machinery was, in fact, installed at Horton, Kansas, under the supervision of appellant, and by workmen furnished by appellant, and the machinery was not finally accepted by bankrupts until appellants had fully and satisfactorily installed same in the bankrupt's ice plant at Horton, Kansas. In fact, any loss before delivery on premises would have fallen upon appellant (R., 15), and no duty was imposed upon bankrupts until such delivery.

The decision of the trial court on this point was based upon such authority as

Wharton on Conflict of Laws, sec. 355.

Hammond on Conditional Sales, p. 252.

Beggs vs. Bartel, 46 Atl., 874.

Hervey vs. Locomotive Co., 93 U. S., 664.

Denny vs. Bennett, 128 U. S., 489; 9 Sup. Ct., 134.

In re Legg (D. C.), 96 Fed., 326.

See also

Southern Hardware & Supply Co. vs. Clark (5 C. C. A.), 201 Fed., 1.

The question therefore arises whether, under the bankruptcy act since its amendment in 1910, there is any distinc-

tion to be drawn between a chattel mortgage and a conditional sale contract arising in Kansas, with reference to its character as a voidable preference, where the conditional sale contract has been filed for record within the period of four months next preceding the commencement of bankruptcy proceedings? The correct solution of this proposition determines the issue now before the court.

Section 5237 of the General Statutes of Kansas, 1909, which provides the registering of conditional sale contracts, provides:

"That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sale of personal property, and that retains the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county wherein the property shall be kept, and shall be entered upon the records the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is wholly paid, without the renewal of the same by the vendor, and any conditional verbal sale of any personal property reserving to the vendor any title in the property sold shall be void as to creditors and innocent purchasers for value."

The statutes of Kansas relating to the rights of an execution of attaching creditor as against property in the hands of his debtor, incumbered by an unfiled conditional contract given by the debtor, has been concisely construed in the following case:

Paul vs. Lingenfelter, 89 Kans., 871.

In that case the Supreme Court of Kansas held that unrecorded title notes, when the property remains in the possession of the purchaser, are absolutely void as against an

attaching creditor of the purchaser, notwithstanding the fact that such creditor at the time of the levy had notice or knowledge of the title notes.

It would thus seem clear that to all intents and purposes in Kansas a conditional sale contract is to be considered as practically on the same footing as a chattel mortgage.

See

Christie vs. Scott, 77 Kans., 257.

In that case, in the course of the opinion, the court speaking through Smith, Justice, uses the following language (p. 260):

"At least since the enactment of section 4257 of the General Statutes of 1901, providing for the recording of such notes and contracts as chattel mortgages, these contracts should be regarded as on the same basis as chattel mortgages. Indeed, the transaction, reserving the title and right of possession and right to retake the property is intended and operates simply as a security for the debt. The transaction does not essentially differ from one in which the seller, at the time of making a sale, takes a promissory note for the purchase price and at the same time, and before he has really transferred the property sold, takes a mortgage thereon to secure the payment of the note—the purchase price. Under the law of this State, such a mortgage conveys the title and right of possession to the mortgagee. In the one case the purchaser agrees unconditionally to pay a certain stated sum as the purchase price, and agrees that the seller shall hold the title to the property and right of possession until the debt is paid, and if it be not paid, that the seller may take the property and sell it and apply the proceeds of the sale towards the payment of the note, implying that the proceeds may be less than the amount of the note. In the other case, the purchaser executes a promissory note and unconditionally promises thereby to pay the purchase price, and before he has actually received the property purchased, conveys the title and right of possession

thereof to the seller, and further agrees that the seller may take possession of the property and sell it and apply the proceeds, less the expenses, towards the payment of the note. There is a theoretical distinction between the two transactions, but no practical difference."

See also *National Bank of Commerce vs. Carbondale Machine Company* (8 C. C. A), 195 Fed., 180, 186. In the latter case the following language appears in the opinion written by Judge Carland:

"By virtue of this positive law of Kansas, the conditional sale contract executed by and between the Carbondale Machine Co. and the bankrupt, when recorded, became a valid chattel mortgage and continues to remain in full force and effect until the amount of same is fully paid."

It is true that in the cases of *Big Four Implement Company vs. Wright and Baker Ice Machine Company vs. Bailey* the Eighth Circuit Court of Appeals attempts to explain this language of Judge Carland and the decision of the Kansas Supreme Court, but it would nevertheless seem that the decision of the Kansas Supreme Court in *Christie vs. Scott* is to the effect that there is no real substantial difference in point of practical operation and effect between a chattel mortgage and a conditional sale contract. Consequently, it would appear that the decisions of the courts with reference to the effect of a failure to file a chattel mortgage less than four months before an adjudication in bankruptcy become entirely applicable to similar situations arising out of a like failure to file or record conditional sale contracts under the requirements of State statutes. Whatever may be the situation elsewhere, as to conditional sale contracts in Kansas, it appears that the Kansas court recognizes the fact that the purchaser under a conditional sale contract, has some very substantial rights as against the seller, similar in their character to those possessed by a

chattel mortgagor against the chattel mortgagee. It is said in the case of Farmers' Co-operative Company (*supra*):

"It has sometimes been said by courts and text writers that a conditional sale amounts to a sale of the property with a mortgage back. That is not its character and nothing but confusion can result from attempting to describe a conditional sale in terms of a mortgage."

But it is to be observed that this is just what the court in the Kansas case has done; and, so far as Kansas contracts are concerned, their view is the binding one; and while it may well be that other courts need pay no respect to their position, yet it is the universal rule that, in these bankruptcy matters, the local law as to the relationship of the parties governs.

The contract between appellant and bankrupts among other things provides:

1st. That bankrupts would, upon acceptance of the completed and installed machinery, execute notes for deferred payments, bearing six per cent interest due and for amounts as follows:

\$500, February 1, 1912.

\$600, April 20, 1912.

\$600, May 20, 1912.

\$600, June 20, 1912.

\$600, July 20, 1912.

\$540, August 20, 1912.

(These notes were so executed and delivered to appellant.)

2nd. "In case of failure or refusal on the part of the party of the second part to make payments on any of them when due under this contract, or to make settlement by the execution and delivery of notes or other obligations as herein agreed, or to pay any note that may be given the party of the first part when the same shall fall due, that then and in such event the whole of the unpaid portion of the purchase money, however secured, and whenever

the other cases the doctrine that an unrecorded conditional sale contract, executed since the amendment to the bankruptcy act in 1910 became effective, is void as against the trustee in bankruptcy, where the property passes into the custody of the bankruptcy court.

Manifestly had this alleged conditional sale contract at issue in the case at bar not been recorded and had the property passed into the control of the bankruptcy court, as the court found it did, in this case, such contract, even if one of conditional sale, would have been void as against the present trustee, and appellant would have no lien or security by virtue of its contract. Under like circumstances, unrecorded chattel mortgages are held invalid.

Similarly, since the amendment of 1910, the various circuit courts of appeal agree that an unrecorded chattel mortgage executed since the 1910 amendment to the bankruptcy act became effective, is void as against a trustee in bankruptcy, where the property has passed into full control of the bankruptcy court. On this point see the following cases:

Pacific State Bank *vs.* Coats (9 C. C. A.), 205 Fed., 618.

Milliken *vs.* Second Nat'l Bank (4 C. C. A.), 206 Fed., 14.

In re Pittsburgh-Big Muddy Coal Co. (7 C. C. A.), 215 Fed., 703.

The decision of the Eighth Circuit Court of Appeals in this case seems to turn on a narrow definition of the word "transfer." That court apparently failed to apply to the word "transfer" the broad definition given it in section 1, subdivision 25, of the bankruptcy act. It is there said:

"Transfer shall include the sale *and every other and different mode of parting with property* or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security;"

It has been decided that this definition of the word "transfer" is broad and comprehensive and that it excludes all narrow and technical definitions of the word.

In the case of *Pirie vs. Chicago Title & Trust Co.*, 182 U. S., 438, the court says:

"It will be observed that payments in money are not expressly mentioned. Transfers of property are, and one of the contentions of appellants is that by 'transfers of property' payments in money are not intended. The contention is easily disposed of. It is answered by the definitions contained in sec. 1. It is there provided that 'transfer' shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift, or security. It seems necessarily to mean that a transfer of property includes the giving or conveying anything of value—anything which has debt-paying or debt-securing power.

* * * * *

"We certainly cannot so declare upon one meaning of the word 'transfer.' If the word itself permitted such declaration, which we do not admit, the definition in the statute forbids it. 'Transfer' is defined to be not only the sale of property, but 'every other and different mode of disposing of or parting with property.' All technicality and narrowness of meaning is precluded. *The word is used in its most comprehensive sense, and is intended to include every means and manner by which property can pass from the ownership and possession of another, and by which the result forbidden by the statute may be accomplished,—a preference enabling a creditor 'to obtain a greater percentage of his debt than any other creditors of the same class.'*"

Under statutes requiring the filing of chattel mortgages and conditional sale contracts, the filing of such instruments is made a substitute as against creditors, for taking actual possession of the property in controversy.

In Williston on Sales, sec. 330, the author, among other things, says:

"The distinction between a sale upon condition subsequent and a conditional sale as ordinarily made with a condition precedent is not so extreme, however, as this argument implies. The ordinary conditional sale does not rest wholly in agreement. It is not merely a contract to sell to which is suspended a contract that the buyer shall have possession. If this were all, the seller could at any time break his contract, subjecting himself thereby to liability of damages. In fact the buyer acquires not simply a contract right but a property right. This is due to the fact that the seller does not simply contract that the buyer shall have possession; the seller actually delivers possession, and this possession is delivered not to hold the goods for the seller, but to use as the buyer's own. Moreover, the buyer, so long as he is not in default, may maintain his possession and use of the property against the world. The situation is, therefore, identical with the case of the condition subsequent, except that in the case of the condition precedent the seller has a bare legal title for the purpose of security only, while in the case of the condition subsequent the seller has only the right to regain a legal title on the happening of a condition. As the purpose of the seller's right, whether a legal title or whether a right to resume the title on breach of condition, is merely to give security for the payment of the price, the transaction is in its essence a mortgage, * * *

"In other States it is held that title does not pass by a mortgage, but merely a lien enabling the mortgagee on breach of condition to acquire or transfer title by foreclosure. Upon this theory a mortgage resembles a transaction where the seller has not retained title, but only a right to resume title on default by the buyer. Although the desirability of a clear theory upon the subject is not to be denied, the differences in result may follow from the difference in theory. It is easy to exaggerate the importance of the distinction between these two views of a mortgage, and similarly between the ordinary conditional

sale where payment is a condition precedent of the passing of the legal title, and the case where non-payment is a condition subsequent, revesting title in the seller; for, though payment be a condition precedent to the vesting of legal title, it is not a condition precedent to the vesting of a right of property in the buyer, called in the cases a 'special property.' The transaction is, therefore, properly called a conditional sale, not a conditional contract to sell. It is error with serious practical consequences to suppose that the conditional buyer's rights rest only in contract."

In *Chicago Railway Equipment Co. vs. Merchants' Bank*, 136 U. S., 268; 10 S. Ct., 999; 34 L. Ed., 349, while referring to notes each of which contained a statement that it was given for personal property the title to which should remain in the payee until the note was paid, Harlan, J., who delivered the opinion of the court, said:

"The agreement that the title should remain in the payee until the notes were paid * * * is a short form of chattel mortgage. The transaction is, in legal effect, what it would have been if the maker, who purchased the cars, had given a mortgage back to the payee, securing the notes on the property until they were all fully paid."

The rule announced by the above text and authorities is practically identical with that announced by the Supreme Court of Kansas. These authorities all hold that the distinction between a chattel mortgage and a conditional sale contract is one of form purely, and that, in their essential characteristics, they are substantially identical.

In the present case we have a contract where the bankrupt purchaser prior to bankruptcy had paid nearly half of the purchase price of the property involved. The bankrupt had thereby obtained in the property covered by the

contract a very substantial, equitable interest. That interest was of just as much value to the bankrupt as it would have been in the event the Baker Ice Machine Company had in form sold this machinery unconditionally to bankrupt, and received back a chattel mortgage as security. The recording statute of the State of Kansas, relating to the filing of conditional sale contracts with the register of deeds, is designed to give notice to the public of the existence of such contracts, and operates with like force as the taking of possession of the property by the holder of the conditional sale contract. Under the statute, before a conditional sale contract is valid against an execution or attaching creditor of the vendee named in such contract, the holder of the conditional sale contract must either have the possession of the property described therein or place his contract on file in the office of the proper register of deeds in Kansas. *The filing of the contract stands in lieu of the taking of possession of the property. In legal contemplation the filing of the contract amounts to a constructive change of possession.* The vendee of property subject to a conditional sale contract, when the property is delivered to him, is in possession of it. This very possession which he has as purchaser of the property obtained clothes him with all the indicia of the ownership of the property. Persons in the possession of property especially if engaged in mercantile business, are usually the owners of it. Their very possession of property of value gives such persons a mercantile rating, credit, and ability to purchase on credit. If the property in the possession of such purchaser is covered by a secret lien such as an unrecorded chattel mortgage or unrecorded conditional sale contract, the very possession of the property by the bankrupt prior to his financial disaster amounts to an indirect false representation of his financial standing, and gives him a rating and commercial standing to which he in like measure is not entitled.

The vendee under a conditional sale contract in posses-

sion of the property has a property right therein of sufficient value that he may, while not in default on his contract, maintain his possession against the world. And this is more strikingly true when as in this case, the vendee has paid \$2,500 of the consideration, or nearly half the purchase price. It would seem to be begging the question to say, if this contract had never been filed for record, and on May 15, 1912, instead of filing the same, Baker Ice Machine Company had taken possession of the property, that the surrender of the property by bankrupts to that corporation would not have been a "transfer." It most certainly would have been a transfer. For section 1, subdivision 25 of the bankruptcy act expressly says that "transfer" "shall include the sale and every other and different mode of disposing of or parting with property or the possession of property absolutely or conditionally, as a payment, pledge, mortgage, gift or security." Certainly, when the vendee in a conditional sale contract, under the circumstances we are considering, surrenders his possession of the property covered by the contract, he has thus disposed at that moment of a valuable property right. In like manner he then parts with the possession of property. And he disposes of the property or parts with its possession either absolutely or conditionally as a payment or security. We have shown that by virtue of statute the filing of the instrument is a legal substitute for taking the possession of the property involved. A "transfer" within the contemplation of the bankruptcy law arose at the time the conditional sale contract was filed, with the same consequences that would have existed had the instrument been a chattel mortgage.

It was ever the object of Congress in the enactment of the bankruptcy law and amendments thereto to invalidate secret liens as against the trustee in bankruptcy. A conditional sale contract, and a purchase-money chattel mortgage or chattel mortgage given for a present consideration, ought in equity and in all reason to stand on the same basis.

In the case of *People's State Bank vs. Gleason, supra*, where nearly one-half of the money loaned was cash advanced the bankrupt at the time of the execution and delivery of the chattel mortgage, the chattel mortgage was held to be an invalid and preferential transfer under the doctrine of *Bank vs. Connett, supra*, because when the chattel was recorded on the eve of bankruptcy the bankrupt was insolvent, and a preference voidable by the trustee in bankruptcy then arose. In that case the points now being urged were fully advanced and argued by able counsel for the bank.

Under authority of *Bank vs. Connett, supra*, and other cases of like import, under the amendment of 1903, *the date of recording, filing or taking possession of the property is to be taken as being the date of the consummation of the transfer, so far as the creditors in bankruptcy are concerned.*

That is, the preference has its origin beginning with the date of the filing, recording or taking possession of the mortgaged property. That is the date when the insolvency of the bankrupt becomes material. That is the date when the knowledge, or reasonable cause to believe on the part of the creditors that a preference was intended, is material.

Since the amendment of section 60, subdivision b, of the bankruptcy law in 1910 there can be no further doubt that by the express provision of the law the filing or recording of a lien required by State laws to be filed or recorded, given more than four months before bankruptcy, but not filed or recorded until within the four months immediately next preceding bankruptcy, is a preference voidable by the trustee in bankruptcy, if the bankrupt, at the time of the filing thereof and at the time of the commencement of bankruptcy, be insolvent, and the party holding such lien at the time of placing it of record *then* have reasonable cause to believe that the enforcement of his claimed security will effect a preference. The amendment of section 60, subdivision b, in 1910, emphatically supports the doctrine of the case of

Bank vs. Connett, and the other decisions of the Eighth Circuit Court of Appeals, which assert that preferences of this character arise at the time the instrument, required by State law to be recorded, is placed of record.

Prior to the amendment of 1910 an unrecorded conditional sale contract was enforceable against a trustee in bankruptcy, and by reason thereof the question of the effect of placing such a contract of record within the period of the four months next preceding the commencement of bankruptcy did not arise for decision until after the amendment of 1910 became effective. The courts uniformly recognized the injustice of such holding, but found themselves without power to remedy the defect, which properly belonged to the legislative branch of the Government. All courts recognized the inequity of the rule of law which would permit a creditor to sell goods to a debtor, who subsequently failed, on an unrecorded conditional sale contract, sit back and permit the debtor to enjoy the property apparently as though unincumbered, and after bankruptcy successfully establish a lien by his unrecorded conditional sale contract. Under the construction given the law by the approved decisions, other secret liens failed. There were and are no special equities by reason of which the holder of an unrecorded conditional sale contract should have this advantage over other unrecorded liens. And the amendment of 1910 amending subdivision 2 to section 47 (a) of the bankruptcy act was also designed to place a conditional sale on the same basis with other liens. The unfortunate result of such decisions as *York vs. Cassell*, 201 U. S., 344, was the moving cause for the amendment of section 47 (a), subdivision 2, of the bankruptcy act in 1910.

The very spirit and essential character of the bankruptcy act as it now reads is emphatically opposed to all secret liens, which the State laws require to be recorded, no matter what the name or form. The bankruptcy act is now designed to invalidate any liens which a creditor may either secure or

perfect by recording or filing his instrument of security, if the State law requires it to be recorded or filed, within the period of four months next preceding the bankruptcy proceedings, where he secures such lien or perfects the same by filing the instrument with notice of existing insolvency and its effect to prefer him over other creditors.

To get the clear intent of Congress with reference to the invalidity of the security claimed in this case under the conditional sale contract which was recorded within four months next preceding bankruptcy, we must consider section 47 (*a*), subdivision 2, and section 60, subdivision *b*, and section 1, subdivision 25, of the bankruptcy act as it now reads together. When these sections are read together, there appears a clear intent of Congress to invalidate all secret liens that are required by State law to be filed or recorded, where the same has been withheld from record, and recorded within the four months next preceding bankruptcy, with knowledge of insolvency and of the preference secured by the recording of the same.

As heretofore stated, it is clear that if the contract now in issue had not been filed with the register of deeds for Brown County, Kansas, the property in question would have passed into the hands of the appellee, the trustee in bankruptcy, wholly discharged of the lien now claimed, and appellant would at most have but an unsecured claim for the unpaid purchase price on the property now claimed by it.

It is, therefore, equally clear that by the recording of the contract in question appellant now seeks to establish thereby a right to reclaim the property which, but for the filing of the contract, would be unenforceable.

It cannot be successfully contended, under the manifest purpose and spirit of the bankruptcy act; that a creditor, whose unrecorded sale, whether reserving the title or creating a lien contract would be absolutely void as against a trustee in bankruptcy in lawful possession of the property, could with knowledge of insolvency, and of the preferential

effect of recording such instrument, long after the execution of the contract, claim security by recording the contract within the four months next preceding bankruptcy. Certainly the bankruptcy act does not state or imply any case or set of circumstances where a creditor, by recording the evidence of his security with knowledge of insolvency and the preferential character of the transaction, long after the execution and delivery of such contract and its consideration, can maintain his security under an instrument which, if unrecorded at the time of the commencement of bankruptcy proceedings would be absolutely void as against the trustee in bankruptcy.

And this is true because the bankruptcy act in spirit and in terms under the last amendment equally condemns a preference acquired by filing an instrument of security within four months of bankruptcy with notice of insolvency and its preferential effect, and the secret lien of an unrecorded security. To hold otherwise would permit the holder of such a contract, who filed the same on one day, under a State law requiring the filing of the same, with positive knowledge of the insolvency of the bankrupt, and of the preferential effect of filing on the claim of such creditor, with bankruptcy following on the succeeding day, to reclaim from the trustee property described in the contract, while the holder of a like contract who was less diligent, or who was not so fortunate in being advised as to the debtor's condition, and failed to record or file such contract, must surrender the property therein described to the bankrupt's trustee for the benefit of the whole estate. The bankruptcy act does not contemplate nor permit such gross injustice. Such preference, secured at any time within the four months preceding bankruptcy, is subject to the same test as that stated in the example set forth above.

It is respectfully submitted that the decision of the District Court of the United States for the District of Kansas, First Division, was right, and should be sustained, and that

the decision of the United States Eighth Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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CHARLES CURTIS,
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Of Counsel.

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IN THE
SUPREME COURT OF THE
UNITED STATES

October Term, 1914.

No. 42

J. F. BAILEY, TRUSTEE IN BANKRUPTCY, IN
THE MATTER OF GRANT BROTHERS, BANK-
RUPT, *Appellant.*

vs.

BAKER HOT MACHINE COMPANY, *Appellee.*

APPEAL FROM UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.

BRIEF FOR APPELLEE.

H. C. BROWN,

CLINTON BROWN,

Attorneys for Appellee.

**IN THE
SUPREME COURT OF THE
UNITED STATES**

October Term, 1914.

No. 321.

**J. F. BAILEY, TRUSTEE IN BANKRUPTCY, IN
THE MATTER OF GRANT BROTHERS, BANK-
RUPTS,** *Appellant.*

vs.

BAKER ICE MACHINE COMPANY,
Appellee,

**APPEAL FROM UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE
EIGHTH CIRCUIT.**

BRIEF FOR APPELLEE.

STATEMENT.

Appellee, Baker Ice Machine Company is a Nebraska corporation engaged in the manufacture of refrigerator machinery at Omaha, Nebraska. On the 14th day of October, 1911, the Baker Ice Machine Company entered into an agreement for the manufacture and delivery to Roy Grant, at Horton Kansas, of certain ice making and refrigerator machinery. it being expressly agreed in the contract of sale that the legal title and the legal possession of the machinery sold should be and remain with the Baker Ice

Machine Company until the purchase price was fully paid. (Transcript p. 13.)

The installation and delivery of the machinery was completed on February 5, 1912. The conditional sale contract was filed for record in the office of the Register of Deeds in the County in which the machinery was delivered and installed on the 15th day of May, 1912. On July 11, 1912, Roy Grant and the other members of the firm of Grant Brothers to which this machinery had been delivered by his direction filed a voluntary petition in bankruptcy and were adjudged bankrupts. Bailey as Trustee of the bankrupt estate took possession of the machinery claiming it as a part of the estate. Approximately \$2,800.00 of the purchase price of the machinery remaining unpaid, the Baker Ice Machine Company intervened in the bankruptcy proceedings, and by its petition sought an order requiring the Trustee to surrender to it the property in controversy. The Referee denied the intervening petition. The learned District Judge affirmed the decision of the Referee. The Baker Ice Machine Company appealed to the Circuit Court of Appeals for the Eighth Circuit. That court reversed the judgment of the District Court and directed that the machinery in controversy be surrendered to the Baker Ice Machine Company unless the Trustee in Bankruptcy should elect to pay the balance due upon the purchase price of the machinery and retain the same. The Trustee appealed from that decision to this court.

ARGUMENT.

The question presented by the record in this case is: *did the Baker Ice Machine Company, by the conditional sale of the machinery in question, and the filing of the contract within four months next preceding the adjudication in bankruptcy obtain an unlawful preference out the bankrupt's property?* The court of Appeals answered this question in the negative, and we submit properly so.

When the trustee in bankruptcy takes possession of property that is not, and never has been, a part of the bankrupt estate, possession having been obtained by the bankrupt by means of a contract expressly reserving the title in the seller until the purchase price is paid, and this contract is of record agreeably to the laws of the state prior to the adjudication in bankruptcy, the trustee takes the interest of the bankrupt and no more; that is, he may retain the property for the benefit of the estate, but he must in that event pay the unpaid portion of the purchase price; failing to do this he must surrender the property to its true owner. The reasons for this conclusion are tersely stated by Judge Amidon in *re: Farmers Co-Operative Company v. Barlow*, N. D., 20 2Fed. 1005, a case on all fours with the one at bar, in the following language:

“The trustee's main reliance, however, is that the granting of the petition of the Plow Company would secure to it a preference over the other creditors of the estate. By Section 60a of the Bankruptcy Act, the contract must be judged as of the date of its filing. Because that date fell within four months of the filing of the petition, the referee held that to enforce the provisions of

the conditional sales contract would secure to the plow company a preference. I am unable to concur in that view for two reasons: First, the bankrupt never had any title to the property. The title was, by the terms of the contract, reserved to the seller. By the great weight of authority, such a reservation is entirely valid. *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *Williston on Sales*, 324. The only right in the property which the bankrupt secured was the right of possession. The property was not, therefore, the property of the bankrupt, and the contract could not in any aspect amount to a transfer of 'its property' within the meaning of sections 60a and 60b. Second, the reservation of title in the contract does not amount to a transfer from the buyer to the seller. It is simply a reservation of title by the seller to himself as one of the conditions upon which possession of the property is transferred to the buyer. The contract cannot, therefore, be held to amount to 'a transfer' from the buyer to the seller. It has sometimes been said by the court and text writers that a conditional sale amounts to a sale of the property with a mortgage back. That is not its character, and nothing but confusion can result from attempting to describe a conditional sale in terms of a mortgage. If the purchaser pays down a part of the purchase price at the time of the sale, or at a subsequent date before the seller attempts to enforce the condition, it is quite true that the buyer has an equitable interest in the property by reason of the payments. When the facts present such a case, it may be that a court of bankruptcy will find a way to protect the equitable interest of the bankrupt against forfeiture. *Williston on Sales*. Par. 579."

A suggestion made in the brief of appellant here that the authority of the above case is impaired by

the suggestion that "the buyer has an equitable interest in the property by reason of the payments" and that "the court of bankruptcy will find a way to protect the equitable interest of the bankrupt against forfeiture" is obviously unsound. It is undoubtedly true that the bankrupt had the right to pay the balance of the purchase price and obtain the legal title to the property. The adjudication in bankruptcy transferred this right with all other *choses in action* of the bankrupt to the Trustee. The court of appeals by its judgment in the case at bar conserved this right by giving to the Trustee the option of paying the balance of the purchase price and retaining the property or surrendering it as in his judgment the interests of the estate might require.

The vice of appellant's contention lies in his failure to note the difference between a chattel mortgage and a conditional sale. A chattel mortgage necessarily involves a transfer of the title to, or a lien upon property belonging to the mortgagor. Prior to the execution of the mortgage the property mortgaged is a part of the estate of the mortgagor. The legal effect of the mortgage is to transfer this property, or an interest in it, to the mortgagee. On the other hand the purchaser under a conditional sale acquires merely the personal possession of the property with the right to become the owner upon the performance of the condition, i e, the payment of the purchase price. It does not become part of his estate. He has no interest that he can transfer except the right to become the owner of the property upon per-

formance of the condition. Neither the execution of the conditional contract, or its subsequent filing in states where record of such contracts is required, operates to diminish his estate in the least. And therefor Sub. B of Sec. 60, of the Bankruptcy Act as amended in 1910 applies to chattel mortgages and bills of sale in which the bankrupt is the vendor, and by means of which his estate was diminished, and does not apply to conditional sales that did not diminish his estate in the least.

Section 1, subdivision 25, of the present bankruptcy act defines transfer as follows:

“Transfer shall include the sale and every other and different mode of disposing of or parting with property or the possession of property, absolutely or conditionally, as a payment, pledge, mortgage, gift or security.”

This definition of transfer was contained in the original act and was in no way modified or changed by the subsequent amendment. In *Bank vs. Massey*, 192 U. S. p. 138, this court announced the rule that a transfer amounting to a preference contemplated the parting with the bankrupt's property for the benefit of the creditor and the subsequent diminution of the bankrupt's estate. This definition of the term transfer has not been modified or changed in any manner, either by judicial construction, or subsequent amendment to the original bankruptcy act. The only effect of the amendment made in 1910 was as to those states in which transfers by way of chattel mortgage or bill of sale of property belonging to and a part of the

bankrupt's estate are required to be recorded to insure their validity as against the claims of creditors and subsequent purchasers, and as to such conveyances definitely prescribing that the four months rule should be applied to the date of filing rather than the date of the instrument or the time when the conveyance was actually made. The effort to place conditional sales, that do not diminish the bankrupt's estate, in the same category with chattel mortgages, that do diminish his estate, must fail. The contention that the statute of Kansas as construed by the Supreme Court of that state has that effect, is sufficiently answered by the Circuit Court of Appeals for the Eighth Circuit in *Big Four Implement Company vs. Wright*, 207 Fed. p. 534. The facts in that case are on all fours with the facts of the case at bar. The court said:

"Prior to 1910 the trustee stood in no better condition than the bankrupt, and these contracts would have been valid as to him, even though never recorded. It is said, however, by the trustee, that this condition has been changed by the amendment of section 47a of the Bankrupt Act made in 1910. That amendment is as follows:

" 'And such trustees, as to all property in the custody or coming into the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a creditor holding a lien by legal or equitable proceedings, thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies, and powers of a judgment creditor holding an execution duly returned unsatisfied.'

“(3) This amendment must speak as of the time of the bankruptcy. The lien which the trustee is considered as holding must be a lien attaching as of that date. There can be no ground for saying that the lien is in existence before the bankruptcy. No case has been cited which so holds. In most of the cases referred to by the trustee the contract was never filed. In *Rock Island Plow Company v. Reardon*, 222 U. S. 354, 32 Sup. Ct. 164, 56 L. Ed. 231, the contract was not filed, yet the vendor had taken possession of the property covered by it before the bankruptcy. It appeared, however, in that case, that prior to that possession by the vendor another creditor had secured a lien by execution, which lien was preserved by the trustee for the benefit of the creditors. There is no authority for holding that a trustee can, in his own right, avoid such contracts as these when they have been filed before the bankruptcy. The decisions are to the contrary. *Keeble v. John Deere Plow Co.*, 190 Fed. 1019, 111 C. C. A. 668 (5th Cir.). Part of the opinion of the court below in this case is found in *Re Jacobson & Perrill* (D. C.) 29 Am. Bankr. Rep. 603, 200 Fed. 812; *Re Farmers Co-operative Co.* (D. C.) 202 Fed. 1005; *Hart v. Emmerson-Brantingham Co.* (D. C.) 203 Fed. 60. In *Sturtivant Bank v. Schade*, 195 Fed. 188, 115 C. C. A. 140 (8th Cir.), it appeared that a deed was made in 1902 and not recorded until August 8, 1906. A petition in bankruptcy was filed on October 8, 1906, and an adjudication had on October 31, 1906. The trustee came into possession of the real estate covered by the deed. The court considered that any judgment lien which the trustee was deemed to have was created subsequent to August 8, 1906. It is not necessary to determine whether, under the amendment of 1910, the lien of the trustee attached on the filing of the petition, or on the date of the adjudication, be-

cause the filing of the papers in this case preceded both dates.

“(4) The trustee claims also that the transactions constitute a preference, saying that the contracts are, under the laws of Kansas, nothing more than chattel mortgages, and, not having been filed until within four months of the bankruptcy, they must be set aside on that ground. *Mattley v. Geisler*, 187 Fed. 970, 110 C. C. A. 90 (8th Cir.). But they are not instruments of that character. They are in the usual form of conditional sale contracts of farm machinery. The Implement Company's contract contains this clause:

“ ‘It is also agreed that the title to and ownership of, and the right to the immediate and exclusive possession, upon demand either oral or written, of all goods which may be shipped as herein provided, or during the current season, shall remain in, and their proceeds in case of sale, shall be the the absolute property of the Big Four Implement Company and subject to their order until full payment shall have been made for the same by the purchaser in money. In case the Big Four Implement Company shall take possession of any property as provided for in this contract, they or their agent shall have the right to sell the same at public or private sale, with or without notice and at such place as they or their agent may deem best, and the proceeds arising from such sale, after paying the expenses of the same, shall be applied to the payment of the indebtedness due to said Big Four Implement Company. The appraisement of said property to be sold is hereby waived, but nothing in this clause will release the purchaser from making payment as herein agreed.’

“The Plow Company's contract contains this clause:

“ ‘It is understood and agreed that the goods sold under this contract may be resold by said party of the second part only in the ordinary course of trade at retail, and that the title to and ownership of all said goods, until sold, in the manner aforesaid permitted together with the proceeds of those sold shall be and remain in the party of the first part and subject to its order until full payment in cash shall have been made by the second party for said goods, or of said notes, and until any judgment rendered therefor or thereon shall be paid in full.’ ”

“ ‘There are no other provisions in either contract limiting these clauses. They are, therefore, under the rule in force in this circuit, conditional sale agreements. *Dunlop v. Mercer*, 156 Fed. 545, 86 C. C. A. 435 (8th Cir.); *In re Pierce*, 157 Fed. 775, 87 C. C. A. 537 (8th Cir.); *Monitor Drill Co. v. Mercer*, 163 Fed. 943, 90 C. C. A. 303, 20 L. R. A. (N. S.) 1065, 16 Ann. Cas. 214 (8th Cir.); *Harkness v. Russell*, 118 U. S. 663, 7 Sup. Ct. 51, 30 L. Ed. 285; *Bryant v. Swofford Bros.*, 214 U. S. 279, 29 Sup. Ct. 614, 53 L. Ed. 997. Are they conditional sale contracts under the laws of Kansas? The trustee says that they are not. He relies for that statement upon a single case, *Christie v. Scott*, 77 Kans. 257, 94 Pac. 214. It was there said:

“ ‘At least since the enactment of section 4257 of the General Statutes of 1901, providing for the recording of such notes and contracts as chattel mortgages, these contracts should be regarded as on the same basis as chattel mortgages. Indeed the transaction, reserving the title and right of possession and right to retake the property, is intended and operates simply as a security for the debt. The transaction does not essentially differ from one in which the seller, at the time of making

a sale, takes a promissory note for the purchase price, and at the same time, and before he has really transferred the property sold, takes a mortgage thereon to secure the payment of the note—the purchase price. Under the law of this state such a mortgage conveys the title and right of possession to the mortgagee. In the one case the purchaser agrees unconditionally to pay a certain stated sum as the purchase price, and agrees that the seller shall hold the title to the property and right of possession until the debt is paid, and, if it be not paid, that the seller may take the property and sell it and apply the proceeds of the sale towards the payment of the note, implying that the proceeds may be less than the amount of the note. In the other case the purchaser executes a promissory note and unconditionally promises thereby to pay the purchase price, and, before he has actually received the property purchased, conveys the title and right of possession thereof to the seller, and further agrees that the seller may take possession of the property and sell it and apply the proceeds, less the expenses, towards the payment of the note. There is a theoretical distinction between the two transactions, but no practical difference.

“The only question which the court decided in that case was that a vendee in a conditional sale contract was liable on his promissory notes, although the creditor had retaken the property. The court said:

“‘Authorities are cited from several states which hold that, where the contract attached to a note shows the seller retained the title and right of possession of the property until payment was made, and took possession of the property, under the contract, the consideration for the note thereby failed and he cannot recover upon the note.

The contract in this case, however, goes further and provides that the seller may take possession of the property, remove and sell the same, and apply the proceeds toward the payment of the note, less the expense of such removal and sale. This is a plain recognition of the obligation to pay the note after the taking of the property.'

"It is also said on page 262 of 77 Kan. (94 Pac. 215):

" 'In the case at bar the purchaser may have had full consideration in the use of the articles purchased for the balance remaining unpaid on his notes. Under the contract attached to these notes, we hold that the plaintiff was authorized to take the property and sell it and apply the proceeds toward the payment of the notes, and that by so doing the law does not imply a revocation of the contract of sale, nor does the law imply that there remains no consideration for the payment of the balance due on the notes.'

"Conditional sale contracts have long been recognized in the law of Kansas. They were valid as to third persons, when there was no statute requiring them to be filed, while there was a statute requiring the filing of chattel mortgages. *Sumner v. McFarlan*, 15 Kan. 600; *Hall v. Draper*, 20 Kan. 137; *Standard Implement Co. v. Parlen Orendorff Co.*, 51 Kan. 544, 33 Pac. 360; *Moline Plow Co. v. Witham*, 52 Kan. 185, 34 Pac. 751. The statutes of Kansas recognize the difference between a chattel mortgage and a conditional sale contract, by providing separate and different provisions for filing. The provision relating to chattel mortgages is found in section 5224 of the Compilation of 1909. Section 5237 relating to conditional sales is as follows:

“ ‘No. 5237. Sale Notes, No. 44. That any and all instruments in writing or promissory notes now in existence or hereafter executed evidencing the conditional sales of personal property, and that retain the title to the same in the vendor until the purchase price is paid in full, shall be void as against innocent purchasers, or the creditors of the vendee, unless the original instrument, or a true copy thereof, shall have been deposited in the office of the register of deeds of the county wherein the property shall be kept, and shall be entered upon the records of the same as a chattel mortgage, and when so deposited shall remain in full force and effect until the amount of the same is fully paid, without the renewal of the same by the vendor; and any conditional verbal sale or personal property reserving to the vendor any title in the property shall be void as to creditors and innocent purchasers for value.’ ”

“Section 5226 requires a chattel mortgage to be renewed every two years. Section 5237, as is seen, provides that the effect of the filing shall continue, without renewal, until payment. Section 5232 provides for a public sale after notice under a chattel mortgage. There is no provision for such sale in the case of conditional sale contracts. The Supreme Court of Kansas did not, in our opinion, intend to hold in the case of *Christie v. Scott* that conditional sale contracts could not exist under the law of Kansas. So far as the effects of filing are concerned, they are similar to chattel mortgages; and this was all that was meant by what was said by this court in *National Bank of Commerce v. Carbondale Machine Company*, 195 Fed. 180, 115 C. C. A. 132.

“These being contracts of conditional sale, there is no foundation for the claim that the filing of them within four months of the bankruptcy con-

stituted a preference. There could be no preference without a transfer by the bankrupt of his property. If there were any transfer in this case it is evidenced by these instruments dated December 8, 1910, and January 23, 1911. But they transferred no property of Bell. They expressly refrained from transferring any to him. *Re Farmers' Co-operative Co.*, (D. C.) 202 Fed. 1005. In *Hall v. Draper*, 20 Kan. 137, it was said by Judge Brewer:

“ ‘In this respect such a conditional sale differs from an absolute sale with a mortgage back. In such case the vendee has everything, except as limited by the terms of the mortgage, here he has nothing except as expressed in his contract.’ ”

The excerpts from the Congressional Debate preceding the 1910 amendment, contained in the brief of appellant, furnish no basis for the contention that Congress had in mind or intended in any wise an enlargement of the term “transfer” as defined in the original act. On the contrary it is clearly apparent that the only purpose of the amendment was to prevent secret transfers from operating to the detriment of the other creditors of the bankrupt. If the logic of appellant was sound it would necessarily follow that a conditional sale, although made in good faith and recorded at the time the sale was made, would be rendered invalid simply because the vendee happened to be adjudged a bankrupt within four months after the date when the sale was made. It is true that under the Kansas statute prior to May 15, 1912, the machinery in question in this case might have been subjected to the lien of an attachment of execution at

the instance of creditors of the bankrupt. But it is not true that after May 15, 1912, when this contract was filed of record, as required by law, or at any time thereafter, any creditor of the bankrupt could acquire an interest in this property by attachment seizure upon execution or otherwise except subject to the claim of the vendor to be paid the balance of the purchase price.

The decree of the court below is right and should be affirmed.

H. C. BROME,
CLINTON BROME,

Attorneys for Baker Ice Machine Company, Appellee.



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IN THE
SUPREME COURT OF THE UNITED
STATES

OCTOBER TERM, 1915.

No. 42.

J. F. BAILEY, TRUSTEE IN BANKRUPTCY IN
THE MATTER OF GRANT BROTHERS,
BANKRUPTS,

Appellant,

vs.

BAKER ICE MACHINE COMPANY,

Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH
CIRCUIT.

H. C. BROWN,

Attorney for Appellee.

**IN THE
SUPREME COURT OF THE UNITED
STATES**

OCTOBER TERM, 1915.

No. 42.

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THE MATTER OF GRANT BROTHERS,
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Appellant,

VS

BAKER ICE MACHINE COMPANY,

Appellee.

**APPEAL FROM THE UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE EIGHTH
CIRCUIT.**

**ANSWER TO ADDITIONAL STATEMENT AND
BRIEF OF APPELLANT.**

Appellant has filed an elaborate additional statement and brief, devoted principally to an effort to establish the proposition that conditional sales and chattel mortgages belong in the same category and for the purpose of determining whether or not the

transaction constituted a preference under the bankruptcy laws should be treated alike. We think the authorities cited by the appellant in his additional brief demonstrate the correctness of our contention that a conditional sale contract may lawfully be made, that its provisions must be interpreted as they are written, and that under the provisions of the contract in question here, the property in question never did become a part of the estate of the bankrupt.

The legal title and ownership of the property was vested in the seller. The vendee acquired the present possession and the right to acquire the legal title upon the payment of the balance of the purchase price. There was no preference, for the Baker Ice Machine Company did not, by the judgment of the Court of Appeals, obtain anything that had ever belonged to the bankrupt, and the trustee, who succeeded to the rights of the bankrupt in the premises is given every right possessed by the bankrupt when the adjudication took place.

There is one suggestion made that should receive attention. It is suggested that the facts found by the Referee (Transcript, p. 21), show that the first shipment of machinery arrived in Horton, Kansas, the place where the ice plant was to be installed, on November 15th, 1911; that the second shipment arrived on November 20th, 1911; that on November 15th, 1911, the bankrupts borrowed of the First National Bank of Horton, Kansas, the sum of \$2,500, and executed a note and a mortgage to the bank on all of said ice machinery

to secure the payment of this note, which mortgage was filed in the office of the Register of Deeds of Brown County, Kansas, on November 17th, 1911, and that thereafter, other shipments arrived in Horton, Kansas, and all the machinery was installed by the representative of the Baker Ice Machine Company, and was, on the 5th day of February, 1912, accepted in writing by Grant Brothers, at Horton, Kansas; and the claim is made that this decree should be reversed and this cause sent back to the District Court for the State of Kansas, the First National Bank of Horton cited to appear, and further litigation respecting its supposed rights under this contract, be entered upon.

The learned counsel for the appellant recognize the fact that no contention of this kind was made before the Circuit Court of Appeals for the Eighth Circuit, upon the hearing of this cause, no question of this character presented to or decided by that court, and no assignment of error relative to that subject made here, but the undoubted power of this court to observe and correct a plain error when the due administration of justice requires such action, is appealed to.

If there were merit in the claim, the fact that it was not presented to the Circuit Court of Appeals ought to prevent its consideration here; but the fact is that the claim itself has no substantial basis in the record. At the time this mortgage was made and for two and one-half months thereafter, the property purporting to be conveyed by the mortgage, was in the actual possession

of the Baker Ice Machine Company. The first shipment had reached the village of Horton, when the mortgage was made. The remainder of the machinery was shipped after the mortgage was made, but it all remained in the manual possession of the vendor until the installation was completed on the 5th day of February, 1912. It needs no citation of authority or argument to demonstrate the proposition that if this mortgage was a valid conveyance at all—which may well be doubted—it operated only to convey to the mortgagee the right the vendee possessed under the conditional sale agreement on and after February 5th, 1912, i. e., the right to complete the payment of the purchase price to the vendor, and thereby obtain the legal title to the property. This right was conserved to the trustee in bankruptcy by the judgment of the Circuit Court of Appeals, respecting which complaint is made. With the adjustment of that right as between the bank and the trustee, appellee is not concerned.

Respectfully submitted,

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Attorney for Appellee.